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In the Supreme Court of the United States

OCTOBER TERM, 1974

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
STUART A. SMITH,
Assistant to the Solicitor General,
ERNEST J. BROWN
ROBERT S. WATKINS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	9
Conclusion	16
Appendix A	1a
Appendix B	3a
Appendix C	18a
Appendix D	20a
Appendix E	22a
Cases:	
Alexander v. *"Americans United" Inc.*, No. 72–1371, decided May 15, 1974	9
Bob Jones University v. *Simon*, No. 72–1470, decided May 15, 1974	9, 11, 12, 15
Cheatham v. *United States*, 92 U.S. 85	10
Enochs v. *Williams Packing Co.*, 370 U.S. 1	9, 10, 11, 12, 13, 14, 15
Lucas v. *Structural Steel Co.*, 281 U.S. 264	12
Lucia v. *United States*, 474 F.2d 565	13
Pizzarello v. *United States*, 408 F.2d 579	13
Shapiro, In re, 352 F. Supp. 641, on review *sub nom. Shapiro* v. *Ferrandina*, 355 F. Supp. 563, affirmed, 478 F.2d 894	3
Snyder v. *Marks*, 109 U.S. 189	10
State Railroad Tax Cases, 92 U.S. 575	10
United States v. *American Friends Service Committee*, No. 73–1791, decided October 29, 1974	9
Welch v. *Helvering*, 290 U.S. 111	12
Wickwire v. *Reinecke*, 275 U.S. 101	12

Statutes and rule:

	Page
Act of March 2, 1867, c. 169, 14 Stat. 471, 475 Section 10	10, 15
Internal Revenue Code of 1954 (26 U.S.C.)	
Sec. 6212	2
Sec. 6212(a)	3
Sec. 6213	2
Sec. 6331	2, 4
Sec. 6861	2
Sec. 6861(b)	3
Sec. 7421(a)	2, 10, 12
28 U.S.C. 1346	15
Rule 142 of the Rules of Practice of the Tax Court	14–15

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v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the district court (Appendix A, *infra*, pp. 1A–2A) is not reported. The opinion of the court of appeals (Appendix B, *infra*, pp. 3A–17A) is reported at 499 F.2d 527.

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[1] This case was styled *Samuel Shapiro and Bella Shapiro* v. *Secretary of State, et al.* in the courts below, because of the presence of a question relating to respondent's extradition. The extradition is no longer at issue in this case. Accordingly, the Commissioner of Internal Revenue is the only petitioner.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1974 (Appendix C, *infra* pp. 18A–19A) and a petition for rehearing was denied on July 17, 1974 (Appendix D, *infra,* pp. 20A–21A). By order dated October 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Anti-Injunction Act (Section 7421(a) of the Internal Revenue Code of 1954) bars a suit in any court by any person to restrain the assessment or collection of any tax.

The question presented is whether the Commissioner of Internal Revenue is required to prove the facts upon which a tax assessment is based before the bar of the Anti-Injunction Act is applicable.

STATUTES INVOLVED

Sections 6211, 6212, 6213, 6331, 6861, and 7421 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix E, *infra,* pp. 22A–25A.

STATEMENT

Respondent [2] is a citizen of the State of Israel who entered the United States in 1970. Sometime after his arrival in this country, respondent was indicted in Israel for securities fraud. The Israeli government sought his extradition and respondent litigated the

[2] References to "respondent" are to Samuel Shapiro. His wife, Bella Shapiro, is a party only because of her co-ownership of property subject to federal tax liens.

extradition request in the United States District Court for the Southern District of New York. The district court found him extraditable and the Second Circuit affirmed. *In re Shapiro,* 352 F. Supp. 641 (S.D. N.Y.), on review *sub nom. Shapiro* v. *Ferrandina,* 355 F. Supp. 563 (S.D. N.Y.), affirmed, 478 F. 2d 894. Respondent thereupon agreed to withdraw his petition for a writ of certiorari in the extradition proceeding (No. 72–1701), and to surrender voluntarily for extradition after receiving assurances from the Israeli government that he could be released on bail pending his trial on the securities fraud charges (Appendix B, *infra,* pp. 4A–5A).

The agreed extradition date was December 9, 1973. On December 6, 1973, the Commissioner of Internal Revenue made jeopardy assessments against respondent pursuant to Section 6861 of the Internal Revenue Code of 1954, aggregating $92,726.41, for nonpayment of federal income taxes for his taxable years 1970 and 1971. On the same date, the Internal Revenue Service filed tax liens upon respondent and served notices of levy upon various banks in the State of New York where respondent maintained accounts or had safe deposit boxes.

Respondent thereupon commenced this action in the United States District Court for the District of Columbia to require the Commissioner to lift the notices of levy [3] and to prohibit the government from ex-

[3] On October 11 and 15, 1973, the Internal Revenue Service served new notices of levy against respondent. Consequently, his property remains subject to the distraint procedures provided by Section 6331 of the Code.

ecuting the extradition warrant pending resolution of the tax dispute. Subsequently, on December 21, 1973, the Commissioner mailed a notice of deficiency to respondent, pursuant to Sections 6861(b) and 6212(a) of the Code. The notice stated that the 1970 assessment was based upon unexplained bank deposits by respondent of $18,000, and the 1971 assessment was based upon unreported income of $137,280 from respondent's activities as a dealer in narcotics (Appendix B, *infra*, pp. 5A–6A).

After a hearing, the district court dismissed respondent's suit for injunctive relief (Appendix A, *infra*, pp. 1A–2A). It held that it lacked jurisdiction to enjoin execution of the extradition warrant. It further concluded that the Anti-Injunction Act barred respondent's action to enjoin the assessment and collection of taxes because it could not find that (1) under no circumstances could the government prevail on the merits of its claim; and (2) that respondent was threatened with irreparable injury for which there was no adequate legal remedy since he could have sought a redetermination of the deficiency in the Tax Court (R. 186–191).[4]

On the same day (May 15, 1974) that this Court announced its decisions in *Bob Jones University* v. *Simon*, No. 72–1740, and *Alexander* v. *"Americans United" Inc.*, No. 72–1371, the court of appeals

[4] "R." references are to the record appendix filed in the court of appeals. On January 3, 1974, respondent filed a petition in the Tax Court for redetermination of the deficiencies set forth in the Commissioner's statutory notice. That suit is presently pending. *Shapiro* v. *Commissioner*, No. 178–74.

affirmed the district court's dismissal of respondent's suit to enjoin execution of the extradition warrant.[5] However, it reversed and remanded the case for an examination of the facts upon which the Commissioner based his tax assessment against respondent. In so remanding, the court of appeals stated that "[w]hile it is not probable that the Government created the deficiency out of whole cloth, it is equally true that "[the Government's] burden [to show good faith] is not met by mere 'protestations of good faith and conclusory statements of plaintiff's tax liability * * *' " (Appendix B, *infra*, pp. 16A.).

Subsequent to the decision by the court of appeals, the district court ordered the government to "file with the Court and serve on the Plaintiffs * * * the factual submission upon which the government seeks to rely as providing a factual foundation that Plaintiff Shapiro was a narcotics dealer and that the government's calculation of the deficiency has a rational basis, so that the Court can determine if the claim is 'entirely excessive, arbitrary, capricious, and without factual foundation' " (Order of October 29, 1974).

[5] Upon his appeal to the court of appeals, respondent filed in this Court an application for a continuation of the court of appeals' stay of the extradition order pending oral argument and decision by the court of appeals (No. A–788). On May 16, 1974, the day following the decision by the court of appeals, the Chief Justice dismissed the application as moot. Respondent was thereupon extradited to Israel and released on bond. His release was allegedly made possible because the Israeli government reduced the amount previously requested as security for his appearance, and a relative in Israel agreed to provide her apartment as partial security for his appearance. (See Appellants' Opposition to Motion to Stay Mandate filed in the Court of Appeals on July 30, 1974, p. 4.)

Pursuant to the district court's order, the government submitted an affidavit of the revenue agent who investigated respondent's income tax liabilities. The affidavit stated that the basis for the deficiencies determined by the Commissioner was as follows:

a. There was no record that Samuel Shapiro had filed an income tax return for 1970.

b. Samuel Shapiro had filed an income tax return for 1971 reporting no tax liability based upon $1,600 in adjusted gross income, consisting of $2,600 miscellaneous income from private tutoring, and net short-term losses from commodity transactions of $1,450 (limited to $1,000 in computing adjusted gross income).

c. Deposits were credited to two accounts in the name of Samuel Shapiro at the First National City Bank, New York, Nos: 04993564 and 05008773, of $18,000 in 1970 and $36,735 in 1971.

d. Early in 1972 Samuel Shapiro paid more than $3,000 in currency for the purchase of an automobile.

e. Information available to the Internal Revenue Service indicated that early in 1973 Samuel Shapiro paid more than $40,000 in cash for a home whose price was $60,000.

f. Information supplied to the Internal Revenue Service indicated that Samuel Shapiro had been smuggling into the United States substantial amounts of an illegal substance, hashish, every six days from Israel, presumably for resale within the United States, and also supported a conclusion that Samuel Shapiro was dealing in hashish, during 1971.

g. The 1971 bank deposits referred to in subparagraph (c) above included money transfers from an individual since convicted of selling hashish, who stated that the transfers were for hashish Samuel Shapiro supplied to him as follows:

April 19, 1971	$2,000
April 23, 1971	2,300
May 6, 1971	2,000
May 11, 1971	1,500
June 8, 1971	1,500
August 18, 1971	5,600

h. Information available to the Internal Revenue Service indicated that the known practice in hashish trafficking was to deal in full kilos (kilograms), equal to 2.2 pounds; that during 1971 the retail price of hashish was $1,360 to $1,980 per pound, or $2,992 to $4,356 per kilo; and that the wholesale cost to a dealer would approximate $2,350 per kilo; and that the common practice in hashish dealing was to receive payment in two parts—the first for cost and the second for profit.

i. On the basis of the information set forth in subparagraphs (g) and (h) above, the revenue agent concluded that during 1971 Samuel Shapiro was dealing in at least 2 kilos of hashish per week, and that his taxable profit therefrom was $137,280, computed as follows:

Selling price	$7,340
Cost	−4,700
Weekly profit	$2,640
1971 profit (52 weeks)	$137,280

j. The revenue agent also concluded that unexplained deposits of $18,000 during 1970 were taxable income.

(Affidavit of November 8, 1974, of Revenue Agent Richard A. Conde, pp. 2–4).

At a hearing held by the district court on November 12, 1974, counsel for respondent submitted two affidavits executed by respondent (which had been filed in the Tax Court) denying that he was or ever had been a dealer in narcotics. Respondent's affidavits further stated that his 1971 income tax return was correct. Counsel for respondent also submitted an affidavit of Rachel Laub, a resident of Switzerland, which stated that at respondent's request in 1970, she held for him in safekeeping $50,000 in cash and approximately 18–20 kilos of gold bars. That affidavit further stated that at respondent's request, she transmitted the cash to him in 1971, and the proceeds of the sale of the gold bars ($32,000 and $35,000) in 1971 and 1972, respectively (Affidavits of Samuel Shapiro and Rachel Laub, dated February 14, 1974 and December 11, 1973).

At the conclusion of the hearing on remand, the district court indicated that the revenue agent's affidavit was insufficient to invoke the bar of the Anti-Injunction Act. It stated to counsel for the government as follows: "I think I am going to have to have some more information. Otherwise, I don't think this affidavit is sufficient. Unless you are willing to submit the informant to examination by the court and the information upon which the affidavit was based by [the revenue agent], I am not fully satisfied, in all candor * * * I just don't feel that this affidavit is sufficient for the court to overcome what the Court of Appeals said the government had to do" (Tr. of Proceedings of November 12, 1974, pp. 71–72).[6]

On November 18, 1974, the government advised the district court that it had determined that it would not submit additional documentary evidence or testimony of confidential informants at this time for *in camera* examination or otherwise. No order has yet been issued by the district court.

REASONS FOR GRANTING THE WRIT

In remanding this case for a hearing to determine the facts upon which the tax assessment was based, the court of appeals has held that the Commissioner of Internal Revenue is required to prove the correctness of a tax assessment before the bar of the Anti-Injunction Act is applicable. That decision conflicts with the rule established by this Court in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, which was reaffirmed only last Term in *Bob Jones University* v. *Simon*, No. 72–1470, and *Alexander* v. *"Americans United" Inc.*, No. 72–1371, both decided May 15, 1974. See also *United States* v. *American Friends Service Committee*, No. 73–1791, decided October 29, 1974. If permitted to stand, the decision below will severely disrupt the orderly collection of taxes by subjecting the Commissioner to injunctive actions which have been explicitly prohibited by Congress for more than 100 years. Since any taxpayer subject to a deficiency assessment can bring an injunctive suit

[6] The record transmitted by the court of appeals does not include any of the material with respect to the remand proceeding. We are accordingly lodging with the Clerk copies of the October 29, 1974 order of the district court, the affidavits filed by the parties, and the transcript of the hearing held by the district court on November 12, 1974.

against the Commissioner in the District of Columbia and gain the benefit of this decision, there is no likelihood that a conflict between the circuits will develop. This Court should review this issue in this case.

1. The federal Anti-Injunction Act, 26 U.S.C. 7421 (a), Appendix E. *infra*, p. 25A, provides with exceptions not applicable that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867[7] in order to prevent the same type of injunctive suits which had flooded the state taxation systems from similarly inundating the federal tax system. This Court soon thereafter recognized the soundness of the Congressional policy which underlay the Act, namely, that if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government itself would be threatened. See *State Railroad Tax Cases*, 92 U.S. 575, 613; *Cheatham* v. *United States*, 92 U.S. 85, 89; *Snyder* v. *Marks*, 109 U.S. 189, 193–194.

The statutory prohibition of injunctions against tax assessment or collection activities is subject to one narrowly limited exception this Court created. In *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 7, the Court unanimously held that a taxpayer could obtain an injunction only if he satisfied a two-fold test: first, he must show that "it is clear that under

[7] The statute originated as Section 10 of the Act on March 2, 1867, c. 169, 14 Stat. 471, 475, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

no circumstances could the Government ultimately prevail" on the merits of it legally claim; secondly, he must show that "equity jurisdiction otherwise exists" for which there is no adequate legal remedy.

The Court recently reaffirmed the *Williams Packing* test in *Bob Jones University* v. *Simon, supra*, decided May 15, 1974. Noting that Williams Packing was the "capstone" of judicial construction of the Anti-Injunction Act and marked an end to cyclical departures from the Acts's plain meaning (slip op. at 16), the Court dismissed an injunctive action seeking to prohibit the Commissioner from withdrawing a private school's tax-exempt status. In *Bob Jones* tives to the Commissioner's action. The Court rejected such an argument as a basis for injunctive relief, declaring that "[t]here is no evidence that [the Commissioner's position] does not represent a good-faith effort to enforce the technical requirements of the tax laws, and * * * we cannot say that its position has no legal basis or is unrelated to the protection of the revenues. The Act is therefore applicable" (slip op. 14).

Although the court below invoked *Williams Packing* as authority for its remand to the district court, its requirement that the government must affirmatively show good faith in the making of its assessment is incompatible with the rule of that case. As the Court there observed, "the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid. *Snyder* v. *Marks*, 109 U.S. 189, 194" (370 U.S. at 8). Thus, *Williams Packing* adhered to the Court's longstanding decisions that a tax assessment is presumptively valid and that the

Internal Revenue, the taxpayer had attributed non-tax no-

burden is on the taxpayer to prove its invalidity. See, *e.g., Lucas* v. *Structural Steel Co.*, 281 U.S. 264, 271; *Wickwire* v. *Reinecke*, 275 U.S. 101, 105; *Welch* v. *Helvering*, 290 U.S. 111, 115.

Accordingly, in order to satisfy the first aspect of the *Williams Packing* test—that the government's claim of liability is without foundation—the taxpayer must come forward with the requisite proof that under no circumstances could the government prevail on the merits of its claim.. The court of appeals' conclusion (Appendix B, *infra*, pp. 16A) that "[the Government's] burden [to show good faith] is not met by mere 'protestations of good faith and conclusory statements of plaintiffs' tax liability' " cannot be squared with this Court's statement in *Williams Packing* that "[t]o require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund" (370 U.S. at 7–8) and its holdings that a tax assessment is presumptively correct.[8]

2. In ruling that the bar of the Anti-Injunction

[8] The court below also erred in holding that respondent met the equitable irreparable injury component of the *Williams Packing* test (Appendix B, *infra*, p. 17A). It based this conclusion upon the fact that the tax levies froze funds respondent intended to use to post bond in Israel. But *Williams Packing* explicitly held that the bar of the Anti-Injunction Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6). Like *Bob Jones University*, this is not a case where respondent has no access to judicial review of the Commissioner's assessment. Indeed, he has commenced an action in the Tax Court for a redetermination of the deficiencies at issue.

Act is not applicable unless the government has proved the correctness of the assessment, the court below relied upon *Pizzarello* v. *United States*, 408 F. 2d 579 (C.A. 2); and *Lucia* v. *United States*, "474 F. 2d 565 (C.A. 5) (*en banc*). Whether or not those cases fully conform to this Court's *Williams Packing* decision, they do not hold that the government must prove the correctness of a tax assessment in order to defeat an action brought by the taxpayer to enjoin its assessment. In *Pizzarello*, the Second Circuit relied upon *Williams Packing* in reversing the denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity. That case, however, is distinguishable. There, the taxpayer had been indicted for operating a gambling establishment for two months. Because of this obvious disparity in the time periods, the court found "no proof in the record * * * that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average * * * represented his average daily business for the other 1,575 days" (408 F. 2d at 583). In enjoining the assessment as excessive, the court noted that the Commissioner's determination that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).

Lucia similarly involved a gambling excise tax assessment based upon a projection of wagering activity. There, the taxpayer argued on appeal that he could demonstrate the error of projection employed by the government. In remanding the case to the

district court for a factual determination of the taxpayer's allegation that the assessment was without foundation, the Fifth Circuit explicitly stated that "the taxpayer, Lucia, will have to prove his case upon remand, and the extent of our holding goes no further than to give him that opportunity" (footnote omitted) (474 F. 2d at 575). Thus, contrary to the decision below, *Lucia* squarely places the burden of meeting the first aspect of the *Williams Packing* test—that the assessment is without any foundation—upon the taxpayer. In that respect, it conflicts with rather than supports the decision of the court below.

3. The disruption to the orderly collection of taxes augured by the decision below has already been confirmed by events which have occurred in the remand proceeding. Pursuant to the district court's order, the government submitted a detailed affidavit of the revenue agent showing the basis for the assessment against respondent. Although this affidavit demonstrated that the assessment was made with regularity and in good faith and that it was not without foundation, the district court required that the government produce for judicial examination its confidential informant and the information upon which the assessment was based (Tr. 71–72).

By forcing the government to come forward in this injunctive action with affirmative proof to justify its assessment, the courts below have not only inverted the burden of proof but have also shifted the forum for the resolution of tax disputes from the Tax Court, where respondent has filed a petition and bears the burden of proof pursuant to Rule 142(a) of the

rules of that court,[9] to the district court. In so doing, they have contravened this Court's consistent recognition that the purpose of the Anti-Injunction Act is to protect the government's need to assess and collect taxes as expeditiously as possible "and to require that the legal right to the disputed funds be determined in a suit for refund [or in the other congressionally authorized forum, the Tax Court]."[10] *Enochs* v. *Williams Packing Co., supra,* 370 U.S. at 7. See also *Bob Jones University* v. *Simon, supra,* slip op. at 11, and cases cited therein.

The effect of the decision below will be to convert the litigation of jeopardy assessments into injunctive actions in which the Commissioner will be forced to prove the correctness of his assessment. Such a radical departure from the rule of *Williams Packing* and *Bob Jones University* by a court whose jurisdiction is open to all taxpayers calls for review by this Court.

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[9] Rule 142(a) of the Rules of Practice and Procedure of the United States Tax Court states: "The burden of proof shall be upon the petitioner [the taxpayer], except as otherwise provided by statute, and except that, in respect of any new matter * * * pleaded in his answer, it shall be upon the respondent [the Commissioner]."

[10] Because *Williams Packing* involved employment (F.I.C.A. and F.U.T.A.) taxes over which the Tax Court has no jurisdiction, the opinion only referred to a refund suit. See 28 U.S.C. 1346.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
STUART A. SMITH,
Assistant to the Solicitor General.
ERNEST J. BROWN,
ROBERT S. WATKINS,
Attorneys.

DECEMBER 1974.

APPENDIX A

United States District Court for the District of Columbia

Civil Action No. 2172–73

SAMUEL SHAPIRO AND BELLA SHAPIRO
v.
SECRETARY OF STATE, ET AL.

Order

Upon consideration by the Court of Plaintiffs' motion for a preliminary injunction, defendants' opposition thereto, defendants' motion to dismiss and plaintiffs' opposition thereto, the entire record herein and argument of counsel, and for the reasons set forth in the oral opinion of the Court rendered December 21, 1973, it is, by the Court this 21st day of December, 1973,

ORDERED and DECREED:

1. That the Court lacks jurisdiction over the cause; and

2. That plaintiffs have failed to meet the requirements for the issuance of a preliminary injunction as set forth in the case of *Virginia Petroleum Jobbers Ass'n.* v. *FPC,* 104 U.S. App. D.C. 106 (1958); and

3. That the Court in equity should not interfere with the execution of the extradition warrant issued by the Secretary of State relative to plaintiff Samuel Shapiro; and

4. That plaintiffs' motion for a preliminary injunction be, and the same hereby is denied; and

5. That plaintiffs' action be and the same hereby is dismissed; and

6. That the plaintiffs' application for a stay of the operation of this judgment is granted and the temporary restraining order of December 14, 1973 is extended to and including 6:00 p.m. Wednesday, December 26, 1973 by consent of the parties to enable plaintiffs to seek a stay in the U.S. Court of Appeals for the District of Columbia Circuit, in accordance with the arrangements made by the parties with the Clerk of the Court of Appeals on December 21, 1973.

Charles R. Richey,
CHARLES R. RICHEY,
United States District Judge.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 73-2260

SAMUEL SHAPIRO, BELLA SHAPIRO, APPELLANTS

v.

SECRETARY OF STATE, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided May 15, 1974

Nathan Lewin, with whom *Herbert J. Miller, Jr.* and *Martin D. Minsker* were on the brief, for appellants.

Robert S. Watkins, Attorney, Department of Justice, with whom *Scott P. Crampton,* Assistant Attorney General, *Earl J. Silbert,* United States Attorney and *Robert S. Rankin,* Assistant United States Attorney were on the brief, for appellees. *Arnold T. Aikens,* Assistant United States Attorney also entered an appearance for appellees.

Before: FAHY, *Senior Circuit Judge,* LEVENTHAL and ROBINSON, *Circuit Judges.*

PER CURIAM: Appellant Samuel Shapiro, a citizen of Israel, sought to enjoin his extradiction by the United States, or, in the alternative, to enjoin a jeopardy assessment made against him by the Commissioner of Internal Revenue. Holding that it lacked jurisdiction, the District Court denied a motion for preliminary injunction and dismissed the complaint. Because we believe that the District Judge acted pre-

naturely in dismissing the complaint against the Commissioner insofar as appellant sought to enjoin the jeopardy assessment, we remand the case for further proceedings in that regard.

I. Background

Sometime after coming to this country during 1970, appellant was indicted in Israel for securities fraud. The Israeli government sought his extradition, and appellant litigated the extradition request in the Southern District of New York. The District Court there found him extraditable [1] and the Second Circuit affirmed.[2] Thereafter, appellant petitioned the Supreme Court for a writ of certiorari and also began negotiations with the Israeli government, in which the Department of State acted as intermediary. Appellant offered to forego further litigation, to withdraw his petition for certiorari, and to submit voluntarily to extradition; in return, he asked: (1) to remain in the United States until the birth of his child, expected in the fall of 1973; (2) to receive a speedy trial in Israel; and (3) to be free on bond before and during trial. After a dispute over the bail question Israel agreed to appellant's requests, and appellant withdrew his petition for certiorari.

Appellant's wife gave birth to a daughter on November 15, 1973, and appellant so notified the Department of State. The Secretary of State then signed a warrant of extradition and appellant agreed to surrender to the United States Marshal in New York on December 9, 1973, for immediate extradition. Appellant also

[1] *In re Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973) (District Judge sitting as extradition magistrate). Thereafter, appellant sought a writ of habeas corpus and another District Judge reviewed the findings of the magistrate. *Shapiro* v. *Ferrandina*, 355 F. Supp. 563 (S.D.N.Y. 1973).

[2] *Shapiro* v. *Ferrandina*, 478 F. 2d 894 (2d Cir. 1973).

arranged to transfer to the New York branch of the Bank Leumi of Israel certain funds then on deposit in several New York banks. These funds were to be used as bond for appellant's freedom in Israel under his arrangement with the Israeli government. On December 6, 1973, however, one business day before appellant's extradition, the Internal Revenue Service (IRS) imposed a jeopardy assessment on appellant, and served "Notices of Levy" on the New York banks in which appellant maintained accounts or safe deposit boxes. Appellant claims these levies distrained the money which he planned to use as bond in Israel.

Following the IRS's actions, appellant received from Israel a one-week postponement of his extradition. During this week, he brought suit in the District Court for preliminary and permanent injunction against either extradition or the action of the IRS. In response, the Government moved to dismiss the complaint for failure to state a cause of action, and for lack of subject matter jurisdiction. Initially the District Court issued a temporary restraining order against the extradition, but did not restrain the levies on appellant's funds. After filing his complaint, appellant served interrogatories on the IRS, seeking information about the nature of the tax claim against him and the investigation underyling the claim. The IRS reluctantly responded to several of appellant's interrogatories,[3] but resisted others as irrelevant or premature.[4] In particular the IRS asserted that it could withhold all information about the nature of its claim against appellant for sixty days, *i.e.*, until required to serve a notice of deficiency. The IRS further contended that the District Court lacked jurisdiction to

[3] Shapiro had to compel response by motion to the District Court.

[4] Of nine interrogatories, the IRS answered only three.

investigate the claim underlying the jeopardy assessment, or, indeed, any aspect of the asserted tax liability. The IRS answered the interrogatories on December 19, 1973, and on December 20, 1973, the District Judge announced that he would render a decision at 3:00 p.m. the following day, December 21, 1973. On December 21, 1973, at 12:20 p.m., appellant's attorney received a supplement to the answers previously given by the IRS to the interrogatories. This supplement, containing the formal notice of deficiency that the IRS had previously withheld, revealed for the first time the basis of the assessment against appellant. The Commissioner asserted that appellant owed taxes for income derived from "activities as a dealer in narcotics. * * *"[5] Thereafter, at 3:00 p.m., the District Judge convened the previously announced hearing, stated from the bench that he lacked jurisdiction of the subject matter, and, accordingly, denied the motion for preliminary injunction and dismissed the complaint. Appellant appeals this decision.

II. The Extradition

Although appellant sought to enjoin the IRS in the District Court, he asked, in the alternative, that the court enjoin his extradition. Because the Second Circuit has determined that appellant is extraditable, and because the Secretary of State has signed a valid warrant of extradition, the District Court properly concluded that it lacked jurisdiction to enjoin appellant's extradition. Subject to judicial determination of the applicability of the existing treaty obligation of the United States to the facts of a given case, extradition

[5] The allegations of narcotics dealing pertained to taxable year 1971. The notice also asserted a small deficiency based upon certain unexplained bank deposits made by appellant in 1970.

is ordinarily a matter within the exclusive purview of the Executive.[6] Accordingly, we affirm the trial judge's conclusion that the extradition should not be enjoined.[7]

III. The Jeopardy Assessment

As to appellant's complaint to enjoin the jeopardy assessment made by the IRS, it appears that the dismissal of the action was premature. The District Court has limited jurisdiction to entertain a suit for injunction against the Commissioner, to whom we refer interchangeably with the IRS, and it is understandable, in the circumstances in which the problem was presented for decision, that the District Judge decided that Shapiro had not met the strict tests for that jurisdiction. On reflection, however, we think that Shapiro should have been indulged a greater opportunity to do so.

A. *Statutory and Judicial Background*

Ordinarily, the Commissioner cannot attempt to collect an asserted tax deficiency until he has mailed a notice of deficiency to the taxpayer and the period during which the taxpayer may file suit in the Tax Court has expired.[8] And if the taxpayer files suit, the collection is further enjoined until the final decision of the Tax Court.[9] The single exception to this pro-

[6] *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

[7] Our order of February 14, 1974, suspending the effectiveness, as therein stated, of this court's denial of appellant's application for a stay, was not intended to affect appellant's extradition except as the Supreme Court might act with respect thereto.

[8] When the Commissioner determines that a taxpayer has failed to pay the correct tax in a previous year, he may issue a notice describing the alleged deficiency. Int. Rev. Code § 6212(a).

[9] Int. Rev. Code § 6213(a).

cedure comes when the commissioner "believes that the assessment or collection of a deficiency * * * will be jeopardized by delay * * *;" in that event "he shall * * * immediately assess such deficiency * * *, and notice and demand shall be made by the [Commissioner] for the payment thereof."[10] This is the jeopardy assessment procedure that the Commissioner used against Shapiro. Once the Commissioner has made a jeopardy assessment, he must notify the taxpayer and demand payment of the asserted deficiency. If the taxpayer neglects or refuses to pay within ten days after notice and demand, the Commissioner may collect the tax by seizing property of the taxpayer.[11] Moreover, "[i]f the Secretary [of the Treasury] or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section."[12]

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[10] Int. Rev. Code § 6861(a). Once the Commissioner makes the jeopardy assessment, he has sixty days in which to mail a deficiency notice to the taxpayer. Int. Rev. Code § 6861(b).

[11] Int. Rev. Code § 6331(a). By levy is meant "the power of distraint and seizure by any means." Int. Rev. Code § 6331(b).

[12] Int. Rev. Code § 6331(a). It should be noted that section 6331(a) requires that the Commissioner provide a taxpayer prior notice of the demand for payment. The power to levy is inoperative until the subsequent "failure or refusal" of the taxpayer to pay the required amount. In the present case there are allegations that the Commissioner failed to provide the taxpayer the required notice prior to serving "Notices of Levy" on the taxpayer's New York banks. If so, then the Commissioner may well have violated Shapiro's right to due process. *See, e.g., Mrizek* v. *Long*, 187 F. Supp. 830, 835 (N.D.Ill. 1959):

"* * * if plaintiffs are being thus deprived of their property

A taxpayer against whom a jeopardy assessment is made must generally pay the asserted deficiency prior to litigation, and cannot obtain an injunction against the Commissioner from a district court.[13] There is, however, a single limited exception to this general rule. In *Enochs* v. *Williams Packing & Navigation Co.*,[14] the Supreme Court held that if equitable jurisdiction would otherwise exist—due to extraordinary circumstances causing irreparable harm to the taxpayer, for which the taxpayer has no adequate remedy at law—and if the taxpayer can show, on the basis of the facts available at the time of trial, that the Commissioner could not ultimately establish his claim, then a district court may issue an appropriate injunction.[15] This exception is quite narrow:

> Only if it is * * * apparent [at the time of trial] that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise the District

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by administrative action purporting to conform, but failing to conform, to the requirements of Section 6331, the plaintiffs have sufficiently alleged deprivation of property without due process of law in violation of the Fifth Amendment."

If proven, this alleged failure by the IRS to adhere to the statute might well be sufficient basis for an injunction against the levies, assuming the presence of the other essentials of equitable jurisdiction. Certainly, such a failure would vitiate much of the good faith presumption accorded the IRS in these matters. *See* text, *infra*, at note 30. But absent an express finding of fact by the District Court, we are reluctant to lend dispositive weight to the untested allegations in appellant's brief.

[13] Int. Rev. Code § 7421(a).

[14] 370 U.S. 1 (1962).

[15] *See also Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932).

> Court is without jurisdiction and the complaint must be dismissed.[16]

The rationale of this judicially-created exception to the anti-injunction provision of the Internal Revenue Code is that district courts should be able to enjoin an asserted deficiency which is in fact an "exaction in the guise of a tax,"[17] if the exaction will cause the taxpayer irreparable harm.

When an asserted deficiency is an exaction rather than a tax, there can be no valid collection purpose which is stymied by the court's intervention.[18] Accordingly, the Commissioner can assert no interest that outweighs the taxpayer's interest in avoiding irreparable harm.[19]

B. *Application of the* Enochs *exception to the present case*

The principal focus of Shapiro's complaint is on facts that support a claim that his case contains the "special and extraordinary circumstances" that fulfill the equity half of the *Enochs* test for district court jurisdiction to enjoin a jeopardy assessment. As to the other half of the *Enochs* requirement, a showing that the IRS could not establish its claim, Shapiro's strongest argument to the District Court was that the actions of the IRS, when viewed in the whole context of pre-assessment events, constituted an illegal deprivation of his property without due process. In view of *Phillips* v. *Commissioner*,[20] the District Judge rejected the due process argument, and reluctantly granted the Government's motion to dismiss for lack of jurisdiction.

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[16] *Enochs*, *supra*, 370 U.S. at 7.

[17] *Miller*, *supra*, 284 U.S. at 509.

[18] *Id.* at 509–10. *See also Dows* v. *Chicago*, 78 U.S. (11 Wall.) 108 (1870).

[19] *Miller*, *supra*, 284 U.S. at 510.

[20] 283 U.S. 589 (1931).

1. The District Judge correctly rejected Shapiro's due process argument with respect to the jeopardy assessment. But see footnote 12 as to the levy. In *Phillips*, the Supreme Court held that summary tax collection procedures are not violative of due process because the taxpayer has an opportunity for a subsequent hearing:

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. * * * Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.
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> * * * * *
>
> The procedure provided in [the Code] satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. (Citations omitted.)[21]

Appellant's attempt to avoid *Phillips* is unavailing. Although he is to be extradited for trial in Israel, it is unclear at this time that Shapiro will be unable to utilize his right to the subsequent judicial review that Justice Brandeis found in *Phillips* a sufficient protection for a taxpayer's right to due process. Of course, if the Tax Court should deny appellant a continuance until he can return to this country, or if the Immigration and Naturalization Service should refuse to allow appellant to re-enter the United States to litigate in the Tax Court, then the question of deprivation of due process may arise. But these events may never transpire, and unless and until they do we are not called upon to rule whether the procedures followed by the IRS fall outside the ambit of the

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[21] *Id.* at 596–97.

Supreme Court's holding in *Phillips,* as recently reaffirmed in *Fuentes* v. *Shevin.*[22]

2. Notwithstanding the obstacle to relief posed by *Phillips,* there is another theory that might validate Shapiro's contention that the Commissioner will be unable to establish his claim for a deficiency. Case law in other circuits has established conclusively that the IRS cannot prevail when its asserted claim is "entirely excessive, arbitrary, capricious, and without factual foundation. * * *" *Lucia* v. *United States,* 474 F. 2d 565, 573 (5th Cir. 1973) (*en banc*); *Pizzarello* v. *United States,* 408 F. 2d 579 (2d Cir. 1969). Thus, if Shapiro can show, or if the trial court can determine from factual submissions of the Commissioner, that there is no factual foundation for the allegation that Shapiro was a narcotics dealer, or that the Government's calculation of the deficiency has no rational basis, then the District Court could find that the Government could not ultimately establish its claim.

3. Because he filed his complaint prior to the IRS's revelation of the basis and amount of its claim against him, Shapiro could not deny in his complaint that he was a narcotics dealer nor did he allege that the IRS's claim was invalid because it was arbitrary and excessive. But in the circumstances, such allegations are fairly implicit in the complaint and, broadly construed, the complaint should have been sufficient to withstand the Government's motion to dismiss.[23] Certainly the record contained no facts that would support any conclusion inconsistent with this view of the case.[24] Accordingly, the District Judge might have allowed Shapiro an opportunity to discover more evidence, or he could have compelled the Commissioner to provide factual support for the asserted deficiency. Alternatively, if the District Judge found the original complaint insufficient, he could have allowed Shapiro to amend it after the Commissioner's eleventh hour promulgation of the notice of deficiency.[25] But the District Judge we think should not have dismissed the complaint on the bare record before him.

[22] 407 U.S. 67, 92 n. 24 (1972).

[23] As one judge has ruled in similar circumstances,

"On a motion to dismiss, [the *Enochs* test for jurisdiction] is applied only after the factual allegations of the complaint have been construed in a manner most favorable to the pleader. Under 'the most liberal view of the law and facts' as deemed established by the pleadings, we are unable to say that the plaintiff has not met 'the requirement of showing that the United States cannot under any circumstances prevail." [Citations omitted.]

Monsky v. *Fitzgerald,* 297 F. Supp. 943, 946 (E.D.N.Y. 1968).

4. An effort by the District Court to discover the factual foundation for the IRS's claim against a taxpayer is consistent with *Enochs.* Indeed, both *Lucia* and *Pizzarello* underscore the Supreme Court's ruling in *Enochs,*

> that the question of whether the Government has a chance of ultimately prevailing is to be determined *on the basis of the information available to it at the time of suit.* [Emphasis added.][26]

As to the extent of the necessary inquiry into the facts, *Lucia* and *Pizzarello* also provide some guidance to the District Judge. For instance, in both cases two central facts had already been established on the

[24] Indeed, it is settled that "[f]or the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted." *Jenkins* v. *McKeithen,* 395 U.S. 411, 421 (1969), *citing Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 174–175 (1965).

[25] *See* Fed. R. Civ. P. 15; *Bonanno* v. *Thomas,* 309 F. 2d 320, 322 (9th Cir. 1962).

[26] 370 U.S. at 7.

public record before the cases came to the District Court: both courts knew (1) that the taxpayer had owned an illegal gambling establishment, and (2) the method by which the IRS had calculated the asserted deficiency.[27] Even with this information available to it, the Fifth Circuit in *Lucia,* sitting *en banc,* ruled unanimously that a fuller record was necessary for a proper determination whether the asserted deficiency was arbitrary and excessive. Accordingly, the court remanded the record to the District Court for further development:

> Was the taxpayer accepting wagers during the entire period covered by the assessment? Are the Government's figures based on realistic projections or were they merely derived Mandrake-like, from a filament of evidence and subjected to a sleight-of-hand computation? Does the 40% factor used in the computation have any factual basis, or is it merely the product of an agent's conjecture? Can the base day properly be assumed to be an average day for that week, much less for several years? Only after exploring all relevant considerations on remand will the District Court be able to determine whether the computative basis is so insufficient as to make the assessment an exaction in "the guise of a tax" rather than a legitimate tax on wagers.[28]

[27] In view of the holdings of the Second and Fifth Circuits that the IRS cannot prevail when its asserted deficiency was arbitrary and plainly excessive, we do not think *Lucia* and *Pizzarello* can fairly be confined to situations where it happens that the court had access to the facts and theory of the Government as developed in a prior criminal trial. The theory of Judge Weinstein in *Monsky* requires the Government to come forward in order to counter the complaint with a claim of lack of jurisdiction. And we note that *Lucia* was not based solely on the facts already known, for the appellate court remanded for further discovery.

[28] 474 F. 2d at 575.

On the other hand, in *Pizzarello* the Second Circuit acted without a remand. Where the Commissioner had asserted a large tax deficiency for several years of gambling income, but had determined this deficiency from only three days' gambling receipts, the court ruled that the Government's claim was excessive:

> * * * [T]here is no proof in the record before us that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average of April 12th–14th, 1962, represented his average daily business of the other 1,575 days. No court could properly make such inferences without some foundation of fact.
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> * * * * *
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> * * * the indictment charged Pizzarello with operating a bookmaking establishment only from March 30, 1965, to April 15, 1965. Where the Government got the date that Pizzarello was accepting wagers from April 1, 1960, is unsupported either by the record or by affidavits. Moreover, while we recognize the difficulties faced by Treasury Agents, and the need to estimate in situations of this nature, wagers received on three consecutive days can hardly be said to be representative of wagers received over a five-year period, even assuming Pizzarello accepted wagers for as long as the Government contends.
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> * * * * *
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> Because the District Director made a totally excessive assessment, excessive because based on entirely inadequate information, collection should be enjoined, if equity jurisdiction otherwise exists. [Footnotes omitted.][29]

[29] 408 F. 2d at 583–84. The Court in *Pizzarello* also held, in the alternative, that the IRS could not establish its claim because it had acted on the basis of illegally seized evidence. *Id.* at 585.

5. By its instant ruling, this court does not require the District Court to explore the matter in precisely the same manner as the District Court was instructed to do in *Lucia*, or as the Second Circuit did in *Pizzarello*. Every case is different and should be considered on its particular facts. But at the very least the District Court must obtain some evidence by which to judge whether the asserted deficiency was a tax or was so arbitrary and excessive as to be "an exaction in the guise of a tax." While it is not probable that the Government created the deficiency out of whole cloth, it is equally true that "[the Government's] burden [to show good faith] is not met by mere 'protestations of good faith and conclusory statements of plaintiff's tax liability. [Citation omitted.]' "[20] The District Court should therefore inquire whether there are any facts from which good faith may be inferred, and absent such facts, the judge should not dismiss the case in deference to any presumption in favor of the IRS.

IV. Disposition

We therefore vacate the judgment dismissing the complaint for lack of jurisdiction, and remand the case to allow the District Court an opportunity to develop a record that adequately supports a ruling on the Government's motion to dismiss. On remand the District Judge should examine the facts on which the Government bases its claim against Shapiro and determine its jurisdiction on the basis of these facts, in light of *Lucia* and *Pizzarello*. On remand, the judge may wish to reconsider his denial of preliminary injunction. If not, then the jeopardy assessments will stand while the record is developed.

[20] *Monsky*, *supra*, 297 F. Supp. at 944. *See also United States* v. *DiCalese*, 32 Am. Fed. Tax R. 2d 73-5629 (E.D. Pa. 1973).

Because the case is somewhat sensitive in nature, it may be that the District Judge will wish to examine some of the Commissioner's information *in camera*. As we do not wish to force the Government to reveal on the public record such information as the names of informers, an *in camera examination* may be appropriate. This matter is within the discretion of the trial judge.

In remanding, it should be clear that we are satisfied that appellant's situation meets the equitable irreparable injury component of the *Enochs* test. Appelant alleges and the Commissioner does not dispute that the jeopardy assessment and the levies have frozen the funds he intended to use as bond in Israel. It therefore appears that after extradition Shapiro will be incarcerated, an incarceration that will cause irreparable injury for which he has no remedy at law. To be sure, Shapiro has a remedy at law against the levy on his funds. But while he can pursue his remedy against the levies either during or after his probable incarceration, a mere restoration of his funds will not repair the injury caused by his imprisonment. *Thus*, if the District Judge finds that there is no factual foundation for the Commissioner's actions, or that the amount of the asserted deficiency is totally excessive then he may enjoin the jeopardy assessment and the levy.

Affirmed as to dismissal of the Complaint insofar as it relates to execution of the extradition warrant, otherwise reversed and remanded for further proceeding consistent with this opinion.

APPENDIX C

[United States Court of Appeals for the District of Columbia Circuit, Filed: May 15, 1974, Hugh E. Kline, Clerk]

United States Court of Appeals for the District of Columbia Circuit

No. 73-2260

September Term, 1973

Civil 2172-73

SAMUEL SHAPIRO, BELLA SHAPIRO, APPELLANTS

v.

SECRETARY OF STATE, ET AL.

Appeal From the United States District Court for the District of Columbia

Before: FAHY, Senior Circuit Judge, LEVENTHAL and ROBINSON, Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court of the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed as to dismissal of the Complaint insofar as it relates to execution of the extradition warrant, otherwise re-

versed and remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court

Hugh E. Kline

HUGH E. KLINE,

Clerk.

Date: May 15, 1974

Opinion Per Curiam

APPENDIX D

[United States Court of Appeals for the District of Columbia Circuit, Filed: July 17, 1974, Hugh E. Kline, Clerk]

United States Court of Appeals for the District of Columbia Circuit

No. 73-2260

September Term, 1973

Civil Action 2172-73

SAMUEL SHAPIRO, BELLA SHAPIRO, APPELLANTS

v.

SECRETARY OF STATE, ET AL.

Before: FAHY, Senior Circuit Judge, LEVENTHAL and ROBINSON, Circuit Judges

Order

The Commissioner of Internal Revenue, one of the appellees herein, has filed a petition for rehearing.

The court has given consideration to *Bob Jones University* v. *Simon,* 42 L. W. 4721, decided on May 15, 1974, the same day our opinion issued, and observes that it reaffirms *Enochs* v. *William Packing and Navigation,* 370 U.S. 1 (1962), which this court sought to apply, including the requirement both of extraordinary and exceptional circumstances, and of a showing that the action of the Internal Revenue

Service is plainly without a legal basis, before any injunctive relief may be granted. We see no reason to modify our mandate.

Accordingly, it is

ORDERED by the Court that appellees' petition for rehearing is denied.

Per Curiam

APPENDIX E

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) [as amended by Sec. 101(f), Tax Reform Act of 1969, *supra*] In General.—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) a a deficiency, over—

(2) the amount of rebate, as defined in subsection (b)(2), made.

* * * * *

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, and Sec. 101(j)(40), Tax Reform Act of 1969, *supra*] In General.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B of chapter 42, he is authorized to send notice

of such deficiency to the taxpayer by certified mail or registered mail.

* * * * *

SEC. 6213 RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, *supra*] Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90- day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

§ 6331. Levy and distraint.

(a) Authority of Secretary or delegate.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon

all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.

The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible). * * *

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a) immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-744

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1974

CERTIORARI GRANTED FEBRUARY 18, 1975

INDEX

	Page
Docket Entries (D.C. D.C.)	1
Docket Entries (C.A. D.C.)	5
Complaint for Injunction	8
Motion for a Temporary Restraining Order	17
Affidavit	20
Notices of Levy	
Exhibit A, Nanuet National Bank	22
Exhibit B, Chemical Bank	24
Exhibit C, Fred Tepper	26
Exhibit D, The Dime Savings Bank	27
Exhibit E, Empire National Bank	29
Transcript of Proceedings (December 13, 1973)	30
Order	71
Plaintiffs' Interrogatories	73
Request for Production, Inspection and Copying	75
Transcript of Proceedings (December 18, 1973)	77
Motion for a Preliminary Injunction	91
Motion to Dismiss	94
Transcript of Proceedings (December 19, 1973)	95
Response to Plaintiffs' Interrogatories Served on Wednesday, December 17, 1973 Pursuant to the Order of This Court of December 18, 1973 Ordering that Answers or Objections be Given to Those Interrogatories Which Through Reasonable and Good Faith Efforts, the Defendant, the Commissioner of Internal Revenue, Could Obtain	128
Supplemental Response to Plaintiffs' Interrogatories Served on Monday, December 17, 1973 Pursuant to the Order of This Court of December 18, 1973 Ordering that Answers or Objections be Given to Those Interrogatories Which Through Reasonable and Good Faith Efforts the Defendant, the Commissioner of Internal Revenue, Could Obtain	132
Transcript of Proceedings (December 21, 1973)	137
Petition	161
Order Allowing Certiorari	163

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. No. 2172–73

SAMUEL SHAPIRO, ET AL.
v.
SECRETARY OF STATE

1973 Date	*Proceedings*
12/13/73	Complaint, appearance; Exhibits I thru V filed.
12/13/73	Summons, Copies (4) and Copies (4) of Complaint issued; all serv. 12–14.
12/13/73	Motion of Plaintiffs for Temporary Restraining Order; Affidavit; Memorandum of P & A's; Exhibits A thru E.
12/14/73	Temporary Restraining Order; security One Hundred Dollars ($100.00) cash; expires Dec. 19, 1973 at 5:00 P.M.; prel. inj. set Dec. 19, 1973 at 3:30 P.M.; issued 2:05 P.M. Serv. 12–14. Richey, J. (N).
12/14/73	Deposit by Counsel for Samuel Shapiro One Hundred Dollars ($100.00) cash security. (1–4–74 Injunction undertaking.)
12/13/73	Motion for Temporary Restraining Order, granted. Bond set at $1,000 Surety or $100.00 cash; preliminary injunction set 12–19–73, 3:00 p.m. (Rep. R. Weber) Richey, J. (N).
12/17/73	Interrogatories by pltfs. to deft. #2; c/m 12–17–73.
12/17/73	Request by pltfs. for production, inspection and copying of deft. #2; c/m 12–17–73.
12/18/73	Motion by plaintiffs to shorten time to answer interrogatories and to produce documents; P & A's; c/s 12/18/73.
12/18/73	Request of pltf. for production of documents, heard and denied; motion to expedite answers to interrogatories, heard and defts. to expedite answers if possible. (Rep: T. Dourian) Richey, J.
12/18/73	Transcript of Proceedings of Dec. 13, 1973, pages 1–68. Rep: R. Weber; Court copy.
12/19/73	Motion of pltfs. for a preliminary injunction; P & A's; exhibit 6, 7, A, 8, 9; c/s 12–19–73.
12/19/73	Corrections to defendant's memorandum of Points and Authorities.

1973 Date	Proceedings
12/19/73	Motion of defts. to dismiss; exhibits #1 thru 11; P&A; opposition to motion for preliminary injunction; c/m 12–19–73.
12/19/73	Motion of pltfs. for preliminary injunction heard, argued and taken under advisement; temporary restraining order extended for 24 hours from 5:00 p.m., 12–19–73. (Rep: T. Dorian) Richey, J.
12/20/73	Motion of pltfs. to compel answers of defts. to interrogatories; c/s 12–20–73.
12/20/73	Memorandum of pltfs. in opposition to defts. motion to dismiss; supplemental memorandum in support; c/s 12–20–73.
12/21/73	Response of deft. #2 to pltfs. interrogatories pursuant to Order of this court of Dec. 18, 1973; c/m 12–19–73.
12/21/73	Supplemental response of deft. #2 to pltfs. interrogatories pursuant to order of this court of Dec. 18, 1972; exhibit A; c/s 12–21–73.
12/21/73	Supplemental memorandum of pltfs.; c/m 12–22–73.
12/20/73	Order extending time for TRO dated 12–14–73 to and including 12–21–73 at 5:00 pm unless vacated. Issued 12–20–73 at 1:48 pm (n) Richey, J.
12/21/73	Motion of pltfs. for Preliminary Injunction heard and denied. (Rep: R. Weber) RICHEY, J.
12/21/73	motion of defts. to dismiss complain heard and Granted. (Rep. R. Weber) RICHEY, J.
12/21/73	Oral motion of pltfs. for stay heard & Granted and TRO of 12–14–73 extended to 6:00 P.M., 12–26–73, by consent of parties. (Rep. R. Weber) Richey, J.
12/21/73	Order denying motion of pltfs. for preliminary injunction; granting motion of Defts. to dismiss complaint; granting motion of pltffs. for stay of operation of this judgment and extending TRO to 6:00 P.M., 12–26–73 by consent of parties to enable pltfs. to seek a stay in USCA. (N) Richey, J.
12/26/73	Notice of appeal by plaintiffs from order entered on Dec. 21, 1973. Copies mailed to Robert H. Rankin, Asst. U.S. Atty. Deposit by Lewin $5.00.
12/27/73	Transcript of Proceedings of Dec. 21, 1973, pages 1–42. Rep: R. Weber; Court copy.
12/26/73	Preliminary record on appeal delivered to USCA; receipt acknowledged.
12/27/73	Certified copy of Order USCA continuing temporary restraining order until further Order of this Court.
1/11/74	Record on appeal delivered to U.S.C.A.; Receipt acknowledged.
1/22/74	Transcript of Proceedings, Dec. 18, 1973, pages 1–24. Court's copy. (Rep: Tom Dourian.)
1/22/74	Transcript of Proceedings, Dec. 19, 1973, pages 1–58. Court's copy. (Rep: Tom Dourian.)
1/28/74	Supplemental record on appeal delivered to U.S.C.A.; receipt acknowledged.

1973 Date	Proceedings
2/14/74	Certified copy order U.S.C.A. vacating order of 12/26/73 of U.S.C.A., sua sponte.
2/15/14	Certified copy Order U.S.C.A. denying appellants' application for stay.
2/19/74	Certified copy Order U.S.C.A. suspending effectiveness of denial of appellants' application for stay, sua sponte. (See order for details.)
2/19/74	Certified copy Order U.S.C.A. that appellants' brief shall be filed by the close of business 2/21/74, and appellees' brief shall be filed by close of business 2/27/74; denying appellants' motions to extend time for stay of extradiction and maintaining the status quo until oral argument. (See order for details.)
5/30/74	Motion of pltfs. for summary judgment; P & A's; Exhibit; Statement of material facts; c/m 5/29/74.
6/ 6/74	Motion by defts. to strike motion by pltfs. for summary judgment, or in the alternative, to stay all further proceedings with respect to the pltfs'. motion for summary judgment; Memorandum of Law; c/m 6/6/74.
7/ 3/74	Order staying all proceedings pending receipt of the mandate from U.S. Courts of Appeals. (N) Richey, J.
7/17/74	Certified copy Order U.S.C.A. denying petition for rehearing.
7/25/74	Transmittal sheet U.S.C.A. returning original record w/reporters transcripts (2 vols.) and one envelope exhibits; 2 vols. suppl. record and suppl. record containing remaining papers to U.S.D.C.
7/25/74	Certified copy Judgment U.S.C.A. affirming judgment U.S.D.C. as to dismissal of complaint as it relates to execution of extradition warrant, otherwise reversing and remanding for further proceedings; opinion attached.
8/ 6/74	Motion of deft No. 2 for extension of time to file a response to motion by pltfs. for summary judgment; Memorandum; c/m 8/5/74.
8/16/74	Opposition of pltfs. to motion by deft. #2 for extension of time to respond to motion for summary judgment; c/m 8/15/74.
8/22/74	Reply memorandum of deft. #2 to pltfs. opposition to motion for extension of time within which to file a response to motion for summary judgment; c/m 8/22/74.
8/22/74	Supplemental memorandum by pltfs. re: motion for extension of time to file response to motion for summary judgment; c/m 8/27/74.
9/17/74	Motion by pltfs. to supplement record; Attachment; c/m 9/17/74.
9/19/74	Order directing deft. to file response to motion for summary judgment by 10/10/74, no response necessary if Solicitor General notifies Court by 10/1/74 that he will file writ of certiorari. (N) Richey, J.

1973 Date	Proceedings
9/19/74	Motion to extend time, heard in part and agreed on. (Rep: T. Dourian) Richey, J.
10/10/74	Response by deft. #2, Commissioner of Internal Revenue, to motion for summary judgment filed by pltfs.; Affidavit of Henry P. Seufert filed as Exh. A w/attachments (2); Memorandum of Law; c/m 10/10/74.
10/10/74	Transcript of Proceedings, Sept. 19, 1974, pages 1-19. Court's copy. (Rep: Tom Dourian.)
10/23/74	Supplemental Memorandum by defts. in support of response to motion for summary judgment; Exhibits 1,2,3; Exhibits A thru E; c/m 10/23/74.
10/29/74	Order denying pltfs. motion for summary judgment; directing defts. to file certain brief with Court by 10-31-74; (signed 10-25-74) (N) Richey, J.
11/ 1/74	Order directing factual submission be served by 11-8-74; setting hearing for 11-12-74 at 9:30 am. (N) Richey, J.
11/ 8/74	Motion by deft. U.S.A. for an extension of time to file factual submissions; P&A's; c/s 11-8-74.
11/ 8/74	Opposition of pltfs. to motion of defts. to extend time for the filing of the factual submissions; exhibit; c/m 11-8-74.
11/ 8/74	Response by Commissioner of Internal Revenue pursuant to order of Oct. 29, 1974; Exhibits A & B; c/s 11/8/74.
11/ 8/74	Order denying motion by defts. for an extension of time. (N) Richey, J.
11/12/74	Hearing on remand begun & concluded. (Rep: T. Dourian) Richey, J.
11/18/74	Response by U.S.A. to Court inquiry; c/m 11/18/74.
11/22/74	Transcript of Proceedings of Nov. 12, 1974; pages 1 thru 83; Rep. Tom Dourian; Court Copy.
11/29/74	Objections by deft. #2 to form of order lodged with Court on Nov. 25, 1974; Memorandum of law; c/s 11/29/74.
12/16/74	Motion of deft. #2 for stay of proceedings; Memorandum of law; c/s 12/16/74.
12/17/74	Status Call. (Rep: T. Dourian) Richey, J.
12/19/74	Order directing discovery be completed by 1-31-75; directing deft. to respond within 10 days after receipt of pltfs. interrogatories; denying motion of defts. to stay. (N) Richey, J.
1/ 3/75	Certified copy Order U.S.C.A. directing Clerk, U.S.D.C. to return certified copy judgment U.S.C.A. forthwith. (Judgment & opinion returned to U.S.C.A. 1/3/75.)
1/ 3/75	Certified copy Order U.S.C.A. granting stay of proceedings.
1/17/75	Transcript of Proceedings; December 17, 1974; pp 1-31. (Rep. Tom Dourian) Court's copy.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2260

Date	Filings—Proceedings
(G)12-26-73	Certified Original Preliminary Record (no transcript).
(G)12-26-73	4-Appellants' emergency application for stay (p-26).
(G)12-26-73	4-Appellees' opposition to emergency application for stay (p-26).
(B)12-26-73	Per Curiam order that the temporary restraining order by the District Court of December 14, 1973, and extended by order of the District Court December 21, 1973 is hereby continued until further order of this Court; Fahy, Sr. CJ and Leventhral, J.
(B)12-26-73	Certified copy of order sent to Clerk, US District Court.
(G)1-11-74	Certified Original Record (2 vols. of transcript) one envelope containing Exhibits (n).
(L)1-21-74	4-Appellees' motion to vacate order "Continuing" temporary restraining order, or in alternative, to summarily deny appellants' emergency application for stay of execution of extradition order (p-21).
(L)1-24-74	4-Appellants' response to motion to vacate order (p-24).
(L)1-28-74	Certified Original Supplemental Record (2 vols. of transcripts).
(L)2-5-74	4-Appellants' motion for clarification of court's communication and/or to extend the time of court's stay of extradition (Ok DMC).
(L)2-6-74	4-Appellant's motion for leave to file exhibit II for clarification with the court (p-6).
(I)2-12-74	4-Appellees' opposition to appellants' motion for clarification of Court's communication and/or extension of Court's stay of extradition (p-12).
(B)2-12-74	Per Curiam order sua sponte, that the order of this Court dated December 26, 1973, continuing the temporary restraining order of the District Court, be and the same hereby is vacated; Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court as promptly as the business of his office permits; Fahy, Sr. CJ and McGowan, CJ.

Date	Filings—Proceedings
(G)2-13-74	4-Appellants' motion for order maintaining status quo until the oral argument on this case (p-13).
(G)2-13-74	4-Appellants' reply to apellees opposition to motion for clarification of court's communication and/or extension of court's stay of extradition (p-13).
(B)2-14-74	Per Curiam order denying appellants' emergency application for stay; Fahy, Sr. CJ and McGowan, CJ.
(B) 2-14-74	Certified copy of order sent to Clerk, US District Court.
(B) 2-14-74	Clerk's order that appellant's brief on the merits shall be filed by the close of business February 21, 1974, and appellees' brief shall be filed by the close of business February 27, 1974; Counsel may submit 10 copies of their briefs and 7 copies of the relevant portions of the record, in xerox form, in lieu of printing requirements of briefs and appendices set forth in the FRAP; further ordered by Court that appellants' motions to extend time of this Court's stay of extradition and order maintaining the status quo until oral argument are denied; Clerk is directed to schedule this case for argument on the merits on March 1st, 1974.
(B) 2-14-74	Clerk's order sua sponte that the effectiveness of this Court's denial of appellant's application for stay is suspended until the close of business February 19, 1974, in order to afford counsel for appellant an opportunity to file, prior to extradition an application for stay in the Supreme Court of the United States, if the application for stay is filed in the Supreme Court within the time allowed, this order will remain in effect pending ruling by the Supreme Court.
(B) 2-14-74	4-Appellees' opposition to motion for order maintaining status quo until oral argument (m-14).
(B) 2-14-74	4-Appellants' supplement to motion for order maintaining status quo until argument.
(L) 2-21-74	25-Appellant's Brief (p-21).
(L) 2-27-74	10-Appellee's Brief (p-27).
(M) 3-1-74	Argued before Fahy, Sr. CJ; Leventhal, and Robinson, CJ.
5-15-74	Opinion Per Curiam.
5-15-74	Judgment affirmed as to dismissal of the complaint insofar as it relates to execution of the extradition warrant, otherwise reversed and remanded for further proceedings consistent with this opinion. (n).
(B) 5-17-74	1-Verified Bill of costs.
(B) 5-28-74	4-Appellants' opposition to appellee's Bill of Costs and Bill of Costs on behalf of appellants (m-28).
(B) 5-29-74	25-Appellee's petition for rehearing (m-29).
(L) 6-17-74	Letter from Appellee advising of additional authorities pursuant to Local Rule 8(g).
(M) 7-1-74	Per Curiam order that each side shall bear its own costs; Fahy, Sr. CJ; Leventhal and Robinson, CJ.
(B) 7-17-74	Per Curiam order denying appellees' petition for rehearing; Fahy, Sr. CJ, Leventhal and Robinson, CJ.

Date	Filings—Proceedings
7-25-74	Copy of opinion and certified copy of judgment issued to the District Court.
7-25-74	Receipt dated July 25, 1974 from the Clerk, District Court for the original record with reporters transcripts (2 vols.) and one envelope of exhibits; one supplemental record with reporter's transcripts (2 vols.) and one supplemental record containing remaining papers.
(L) 7-26-74	4-Appellee's motion to stay mandate (m-24).
(M) 7-30-74	4-Appellants' opposition to motion to stay mandate (m-30).
(M) 8-12-74	Per Curiam order denying appellees' motion to stay mandate; Fahy, Sr. CJ; Leventhal and Robinson, CJ; Sr. CJ Fahy did not participate in the order.
(P) 12-18-74	Notification of filing petition for writ of certiorari in S.C. #74-744 on December 13, 1974.
(M) 1-3-75	Per Curiam order sua sponte, that the Clerk of the District Court is directed to return the certified copy of this Court's judgment forthwith; Fahy, Sr. CJ; Leventhal and Robinson, CJ.
(M) 1-3-75	Certified copy of the above order sent to Clerk, U.S. District Court.
(M) 1-3-75	Certified copy of Judgment and opinion returned from Clerk of the District Court.
(M) 1-3-75	Per Curiam order directing the Clerk to file appellees' motion for stay of proceeding in the District Court; appellees' motion for stay is granted; the Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court as promptly as the business of his office permits; Fahy, Sr. CJ; Leventhal and Robinson, CJ.
(M) 1-3-75	Certified copy of the above order sent to Clerk, U.S. District Court.
(M) 1-3-75	4-Motion for stay of proceedings in the District Court (p-23).
(M) 1-3-75	4-Response to motion for stay of proceedings in the District Court (m-26).

[Filed December 13, 1973]

United States District Court for the District of Columbia

Civil Action No. 2172–73

SAMUEL SHAPIRO, 4 JOAN LANE, MONSEY, N.Y. 10952, (914) 356–6353; AND BELLA SHAPIRO, 4 JOAN LANE, MONSEY, N.Y. 10952 (914) 356–6353, PLAINTIFF

v.

SECERTARY OF STATE, DEPARTMENT OF STATE, WASHINGTON, D.C.; AND COMMISSIONER OF INTERNAL REVENUE, INTERNAL REVENUE SERVICE, WASHINGTON, D.C.; AND ACTING ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C. 20530, DEFENDANTS

COMPLAINT FOR INJUNCTION

I. JURISDICTION

1. This is an action to prevent the defendants, officers of the United States, from affecting the plaintiffs in a manner
2 and form which violates the Constitution and laws of the United States. The matter in controversy exceeds the value of $10,000, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1331.

2. This is also an action to compel officials of the United States to perform duties owing to the plaintiffs by reason of formal promises made pursuant to diplomatic arrangements between the United States and the State of Israel. The jurisdiction of this Court is, therefore, invoked under 28 U.S.C. § 1361, the action being one in the nature of mandamus to compel officers of the United States to perform duties owed to plantiffs.

3. Plaintiffs are residents of New York and the defendants are residents of states other than New York. The matter in controversy exceeds the value of $10,000, exclusive of interests and

costs. The jurisdiction of this Court is invoked under 28 U.S.C. § 1332.

II. THE CLAIM

4. Plaintiff Samuel Shapiro is a native and citizen of the State of Israel. His wife is a native-born citizen of the United States, as is their daughter, who was born on November 15, 1973.

5. Plaintiff Samuel Shapiro was the subject of an extradition request by the State of Israel to the Department of State.
That request was presented to the United States District
3 Court for the Southern District of New York by agents of the defendant Attorney General and was litigated in the said court and in the United States Court of Appeals for the Second Circuit. Decisions on the case are reported at 352 F. Supp. 641, 355 F. Supp. 563, and 478 F. 2d 894. The Israeli charge related to allegations that plaintiff had obtained money from investors in Israel under false pretenses.

6. Throughout the course of these extradition proceedings—and throughout the course of the negotiations entered into among plaintiff's counsel, the Department of Justice, the Department of State, and the State of Israel, as set forth hereinafter—plaintiff has been required to post funds presently within the United States in banks as security for his appearance in the proceedings before the Immigration and Naturalization Service and the District Court. Bonds have been written in the total amount of $55,000, for which the plaintiff has given, as security to the bondsmen, funds totaling approximately $35,000 in bank accounts in the United States.

7. After the decision of the United States Court of Appeals for the Second Circuit rendered on April 6 1973, Counsel for plaintiff, Samuel Shapiro petitioned to the Supreme Court for a writ of certiorari. The petition was filed in the said Court, and was docketed as No. 72–1701.

8. From the inception of the extradition proceedings, plaintiff stated that he was prepared to return voluntarily to Israel to stand trial if agreement could be obtained that he would be released on bond and the trial held promptly. After the
4 filing of the petition for certiorari, discussions between counsel for plaintiff Samuel Shapiro and representatives of the Department of State were had to seek to effectuate an agreeable resolution of the request for extradition. It was

explained to attorneys of the Department of State that plaintiff was confident that he would be acquitted, but was concerned that his departure for Israel would affect the health of his wife, who was than expecting the couple's first baby and that the Israeli Government might refuse to release him on bail for an extended period until his trial was held.

9. With the agreement of plaintiffs' counsel, attorneys for the Office of the Legal Adviser of the Department of State communicated with the Embassy of Israel to see whether the case could be amicably resolved under these conditions. A Diplomatic Note dated August 16, 1973, was delivered to the Embassy of Israel asking whether it would approve of these conditions.

10. On September 4, 1973, the Embassy of Israel replied to the request by agreeing to three conditions in exchange for the withdrawal of the petition for writ of certiorari and the voluntary surrender of the plaintiff. The three conditions were that extradition would be delayed until after the birth of the plaintiff's child and the religious ceremonies incident thereto, that the plaintiff would be released on bail on his return to Israel, and that the trial in Israel would not be interrupted by extended delays.

11. Plaintff's counsel, Nathan Lewin, Esq., was informed on
September 21, 1973, in answer to a letter he sent directly
5 to the Attorney General of Israel, that the plaintiff would be released on bail of 250,000 Israeli pounds (approximately $60,000) when he returned to Israel.

12. On the basis of the representation made to him and the request by the Department of State that he take steps immediately to withdraw the petition for a writ of certiorari, as reflected in Exhibit I attached to this complaint, plaintiff's counsel drafted and submitted for signature by the Solicitor General a stipulation, signed by the Solicitor General for the United States and by plaintiff's counsel is attached hereto as Exhibit II.

13. By Diplomatic Note dated November 9, 1973, the Government of Israel restated its agreement to permit release on bail of 250,000 Israeli pounds, and the contents of that Diplomatic Note were communicated to plaintiff's counsel in a letter dated November 21, 1973. A copy of that letter is attached hereto as Exhibit III.

14. On November 16, 1973, pursuant to the agreement among counsel and with the Government of Israel, plaintiff's attorney notified the Department of State that a daughter had been born
to the plaintiffs.

6 15. Thereafter, pursuant to many discussions over several days, with representatives of the Department of State, the Department of Justice, and the Government of Israel, it was agreed that the plaintiff Samuel Shapiro would voluntarily surrender for extradition to Israel on December 9, 1973. Arrangements were made for the surrender date with the Government of Israel and with the Department of Justice, which assigned a Deputy United States Marshal to be at the United States Courthouse on that day to officially surrender the plaintiff Samuel Shapiro to an agent of the Government of Israel.

16. During the course of these discussions, set forth in paragraph fifteen hereof, plaintiff's counsel made clear that in order to post the bail required by the State of Israel as set forth in paragraph ten above, Mr. Shapiro would have to utilize the funds currently pledged as security for his appearances in the proceedings before the Immigration and Naturalization Service and the District Court as set forth in paragraph six heeof. At the suggestion of an official of the Embassy of Israel, arrangements were made with an Israeli Bank—Bank Leumi—to deposit these funds in the New York Branch of Bank Leumi as partial security for that Bank's guarantee in Israel of the bail
to be posed upon Mr. Shapiro's return to that country.

7 17. Pursuant to the agreements set forth in paragraphs fifteen and sixteen hereof, plaintiff Samuel Shapiro and acquaintances arranged that upon his surrender for extradition assets he had in the United States, including bank accounts which had been posted as security insuring his appearance in judicial proceedings and proceedings before the Immigration and Naturalization Service, would be deposited with the offices of Bank Leumi, an Israeli bank in the United States, so that a bank credit could be given in Israel to secure his release on arrival in that country.

18. On December 6, 1973, without any prior notice or warning whatever, agents of the Commissioner of the Internal Revenue served on banks in New York where the plaintiff maintains accounts and safety deposit boxes and, on information and belief, on all institutions where his assets may be located, Notices

of Levy pursuant to the jeopardy assessment provisions of § 6861 of the Internal Revenue Code. After several hours of seeking to discover on the telephone precisely what the nature of these liens was, plaintiff's counsel was informed at approximately 5:15 p.m. by Mr. Edward Hanley, a group manager with the Office of the District Director of Internal Revenue for Manhattan that the jeopardy assessments claimed liabilities of $6,843 for 1970 and a figure in excess of $83,000 in 1971.

19. Jeopardy assessments in the above amounts would exceed the assets plaintiffs Samuel Shapiro has in the United States and make it totally impossible for him to post security needed for bail in Israel which was the subject of the agreement described in paragraphs 9 and 10 of this complaint.

20. Jeopardy assessments in the above amounts would also leave the plaintiff Bella Shapiro and her daughter, who is three weeks of age, totally without funds on which to live in the absence of plaintiff Samuel Shapiro. Among the bank accounts levied were the accounts located at Chemical Bank, Route 59, West Nyack, New York 10960 and Nanuet National Bank, Route 59, Monsey, New York. These funds were the same funds posted as security for plaintiff's appearance in the proceedings before the Immigration and Naturalization Service and the District Court as set forth in paragraph six hereof.

21. The agents of the Commissioner of Internal Revenue involved in the actions set forth in paragraph eighteen hereof knew prior to the service of said notices on said Banks that plaintiff was the subject of extradition proceedings and was to be surrendered to the State of Israel on December 9, 1973. On information and belief, said agents also knew that the levied funds were, at the time of levy, being utilized by plaintiff as security for his appearances in the administrative and judicial proceedings in the United States as set forth in paragraph six hereof and were to be utilized as security for his bond in Israel as required by the agreements set forth in paragraphs eight through sixteen hereof.

22. On December 6, 1973 and Friday, December 7, 1973 plaintiff's counsel spoke to representatives of the Department of Justice and the Department of State and set forth his views, *inter alia*, that the intervening actions of the IRS violated the agreements concluded pursuant to which plaintiff agreed to surrender his right to further litigate the matter of extradition and constituted gross bad faith on the part of the Government

of the United States. Officials of both Departments advised plaintiff's counsel that they had no prior notice of the actions of the IRS and that they were "surprised" or "shocked" by these actions. On December 7, 1973 the State Department (per Thomas Tallerico, Esq.) informed plaintiff's counsel that as a result of the intervening actions of the IRS the Israelis were prepared to postpone the extradition of plaintiff until Sunday, December 16, 1973 in order to give plaintiff an opportunity to resolve this matter with the IRS.

23. Thereafter, plaintiff's counsel met on Monday, December 10, 1973 with agents of the Internal Revenue Service (Albert Feldberg, Special Agent; Richard A. Conde, Revenue Agent; and Victor F. Godfrey, Revenue Officer) to ascertain the basis for the IRS claim and discuss a possible resolution of the matter. Despite repeated requests, plaintiff's counsel was unable to ascertain from these agents the basis for the I.R.S. claim of taxes due from plaintiff. Plaintiff's counsel proposed to these agents that an agreement be entered into whereby the funds presently under levy (approximately $35,000) be deposited in the New York branch of Bank Leumi as partial security for that bank's guarantee in Israel of plaintiff's bond, with the United States to have a security interest in those funds second only to the State of Israel. Counsel was directed to embody this proposal in a letter. Pursuant to this instruction, plaintiff's counsel, on December 11, 1973, sent the letter attached hereto as Exhibit IV air mail, special delivery, to Mr. Victor F. Godfrey, District Director of Internal Revenue.

24. On December 12, 1973 counsel had delivered by hand a copy of this letter to Mr. Tallerico of the State Department along with a cover letter dated December 12, 1973 and attached hereto as Exhibit V. As set forth therein, plaintiff's counsel requested a further delay of the extradition until the I.R.S. responded to plaintiff's proposal and, if refused, until the judicial resolution of the issues set forth in this lawsuit.

25. As of the filing of this complaint and accompanying motion for a temporary restraining order, plaintiff's have been unable to secure the consent of the I.R.S. to plaintiff's proposal or the consent of the State Department to a postponement of extradition until a decision of this Court on the issues raised herein.

26. Without the funds presently subject to I.R.S. levy as set forth above, plaintiff will not be able to post the security re-

quired for release on bail in the State of Israel. Plaintiff cannot secure alternative funds to post security from any other source. Plaintiff would never have consented to waiver of his rights to litigate the matter of his extradition to the Supreme Court of the United States if he had known that the United States, through the I.R.S., would freeze the funds needed to post the bond required to secure plaintiff's release in Israel pursuant to the agreements set forth above.

27. The agents of the I.R.S. have known of the existing extradition proceedings, which were public knowledge from their inception. The alleged tax deficiencies relate to income in 1970 and 1971. Whatever inquiry the I.R.S. wished to make could have been instituted as much as one year ago. And since plaintiff's funds have been, during this entire period, subject to his appearance bonds before the Immigration and Naturalization Service since December 1972, there could not have been any danger of removal of these funds if an audit or inquiry had been instituted long before plaintiff was scheduled to depart.

28. If the Notices of Levy served on December 6, 1973 are permitted to remain in force simultaneously with plaintiff's extradition, plaintiff will be deprived of his statutory and constitutional rights to contest the legality of the assessments in violation of plaintiff's rights under 26 U.S.C. §§ 6213(a), 6851, 6861 and the Fifth Amendment of the Constitution. He will, for the period permitted for administrative and judicial resolution of the tax claim, be incarcerated in a prison in Israel and, therefore, unable to communicate with counsel representing him in the tax matter.

29. It is plaintiff's belief that the delay in instituting any inquiry whatever with respect to plaintiff's taxes was a deliberate means of preventing him from asserting defenses to the tax claim and denying him assistance of counsel in any proceeding relating thereto.

30. The actions of the State Department, the Department of Justice, and the IRS, together, in negotiating for plaintiff's waiver of his constitutional rights to further contest his extradition upon plaintiff's agreement voluntarily to return to Israel in the expectation that he would have the funds in issue available to post the bond required by the State of Israel, and then seizing those same funds without prior notice three days prior to plaintiff's removal from the jurisdiction of the

United States are violative of plaintiff's Fifth Amendment rights.

31. Unless this Court directs the lifting of the Notices of Levy on plaintiff's funds or, alternatively, enjoins the issuance of the extradition warrant until the matter of tax liability is clarified, plaintiff Samuel Shapiro will be forever deprived of his opportunity to contest the legality of the seizure of his funds and the basis for the Government's claim to plaintiff's money. He will also be deprived of liberty after his voluntary surrender notwithstanding the express and implied promise of the United States not to interfere with his release on bail. Plaintiff Samuel Shapiro will also be deprived of the Supreme Court consideration of his extradition which he voluntarily surrendered in return for the now-broken promises of the United States.

32. Unless this Court grants the relief requested herein, plaintiff Bella Shapiro, who is to be left in the United States with a baby one month old, will lack funds on which she and her child can live. It was and remains the intention of paintiff Samuel Shapiro to provide for his wife and child during his absence by arranging to have friends or family send her money on which to live. This will be impossible if he is incarcerated in an Israeli jail.

III. RELIEF

WHEREFORE, plaintiffs pray:

A. That this Court order the defendant Commissioner of Internal Revenue and his agents to take all actions necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanuet National Bank, Route 59, Monsey, New York; the Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiff's funds; or alternatively.

B. That this Court issue a temporary and permanent injunction ordering the Department of Justice and its agent Thomas E. Ferrandina, United States Marshal for the Southern District of New York to refrain from executing pursuant to 18 U.S.C. § 3186 any warrant for extradition of Samuel Shapiro issued by the Secretary of State under said provision until the issu-

572-247 O - 75 - 2

ance by the IRS of its Notice of Deficiency as required by 26 U.S.C. § 6861 and until such time as plaintiffs shall have had opportunity to contest the legality of the jeopardy assessments made under 26 U.S.C. § 6851 as provided in the applicable provisions of the laws of the United States.

C. For such other and further relief as the Court may deem just and proper.

HERBERT J. MILLER, JR.
NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500, Washington, D.C. 20036
(202) 293–6400,

Attorneys for Plaintiffs.

[Jurats omitted in printing]

[Filed December 13, 1973]

1 United States District Court for the District of Columbia

[Title omitted in printing]

MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs, pursuant to Rule 65 of the Federal Rules of Civil Procedure and the complaint, pleadings, and Memorandum of Points and Authorities filed in support of this motion, hereby move the Court for a temporary restraining order and as
2 grounds therefor state as follows:

(1) Pursuant to arrangements concluded with the Department of State, the Department of Justice, and the State of Israel, plaintiff Samuel Shapiro agreed to waive further rights to litigate in the United States Supreme Court and the State Department his extradition to the State of Israel in return for the agreement of the State of Israel that upon the posting of a bond in the amount of 250,000 pounds plaintiff would be permitted to remain at liberty during the course of his trial there. All parties to this arrangement knew that plaintiff intended and needed to utilize funds presently posted as security in the United States for plaintiff's appearance in the extradition proceedings in the United States as partial security for the bond demanded by the State of Israel; the transfer of these funds to the New York branch of an Israeli Bank (Bank Leumi) as partial security for the Bank's guaranty of the contemplated bond was expressly suggested by the State of Israel during the course of said negotiations.

(2) Pursuant to these arrangements, plaintiff agreed voluntarily to surrender himself for removal to the State of Israel on Sunday, December 9, 1973.

(3) The agents of the Internal Revenue Service knew of the pendency of the extradition proceedings and of the intention of the State of Israel to seek plaintiff's removal. These
3 agents or some of them were in contact with agents of the Department of Justice conducting the extradition proceedings on behalf of the United States. These agents knew, or with an exercise of due diligence could have known, of all

the arrangements set forth hereinabove and in the complaint in this action.

(4) Nonetheless, without any lawful reason, these agents deliberately delayed the commencement of proceedings against plaintiff until three days before his scheduled removal from the jurisdiction of the United States, and then, sometime in the afternoon of December 6, 1973, without prior notice or warning of any kind to plaintiff or counsel, served Notices of Levy on banks and individuals holding the funds contemplated by plaintiff, the Department of State, the Department of Justice and the State of Israel to be utilized as bond pursuant to the arrangements concluded with these branches of the United States Government. The Notices of Levy were purportedly served pursuant to the jeopardy assessment procedures set forth at 26 U.S.C. §§ 6851, 6861.

(5) If the extradition of plaintiff presently set for December 16, 1973 as set forth in the complaint in this case is permitted to go forward while the Notices of Levy remain in force, plaintiff will be deprived of his right to contest the legality of the Government's seizure of his property, his right to liberty on bail during his trial in Israel as expressly and impliedly represented by the Government of the United States
4 and his right to litigate further the legality of his extradition, all in violation of his rights under 26 U.S.C. §§ 6213(a), 6861, and the process clause of the Fifth Amendment as more fully set forth in the pleadings filed herewith.

WHEREFORE, plaintiffs move this Court to enter an order:

(1) Directing the agents of the Internal Revenue Service to take all actions necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanvet National Bank, Route 59, Monsey, New York; the Dime Savings Bank Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiffs' funds; or alternatively.

(2) Enjoining the Department of Justice and its agent Thomas E. Ferrandina, United States Marshal for the Southern District of New York to refrain from executing pursuant to 18 U.S.C. § 3186 any warrant for extradition of Samuel Shapiro issued by the Secretary of State under said provision until the issuance by the I.R.S. of its Notice of Deficiency as required by

26 U.S.C. § 6861 and until such time as plaintiffs shall have had opportunity to contest the legality of the jeopardy assessments made under 26 U.S.C. § 6861 as provided in the
5 States and his right to litigate further the legality of his extradition, all in violation of his rights under 26 U.S.C. §§ 6213(a), 6861, the Due Process Clause of the Fifth Amendment and the right to the assistance of counsel in defending against tax assessments, as more fully set forth in the pleadings filed herewith.

WHEREFORE, plaintiffs move this Court to enter an order:

(1) Directing the agents of the Internal Revenue Service to take all actions necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanuet National Bank, Route 59, Monsey, New York; The Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiffs' funds; or alternatively.

(2) Enjoining the Department of Justice and its agent Thomas E. Ferrandina, United States Marshal for the Southern District of New York, from executing pursuant to 18 U.S.C. § 3186 any warrant for the extradition of Samuel Shapiro issued by the Secretary of State under said provision until such time as plaintiff Samuel Shapiro shall have had opportunity to contest the tax assessment made against him on December 6,
1973, as provided in the Internal Revenue Code and
6 other applicable provisions of the laws of the United States; and

(3) Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Herbert J. Miller, Jr.,
HERBERT J. MILLER, Jr.,
/s/ Nathan Lewin,
NATHAN LEWIN,
/s/ Martin D. Minsker,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036 (202) 293-6400,
Attorneys for Plaintiffs.

United States District Court
for the District of Columbia

[Title omitted in printing]

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

SAMUEL SHAPIRO affirms and says:

1. I am one of the plaintiffs in this action and submit this affidavit in support of my motion for a temporary restraining order.

2. I have been advised by my counsel that the Internal Revenue Service claims that I owe more than $92,000 in taxes for the tax years 1970 and 1971. I filed a tax return for the 1971 tax year, which was accurate and which properly reflected my income and tax obligations. I had no income whatever for 1970.

3. It is my desire to contest the claim of the Internal Revenue Service that I owe taxes, and I wish to do so as promptly as possible.

4. I have also been advised by my counsel that the Internal Revenue Service questioned him on where I had the money to live and to pay for the services of counsel in the matter of my extradition. Before arriving in the United States I had made successful investments in Europe and had funds at that time, part of which I brought with me and the other portions of which were brought to me after I arrived in the United States. I can establish this fact by documentation and by the testimony of witnesses, and would be prepared to do so in a *bona fide* inquiry into my tax obligations.

5. If the assessments that have been made on the accounts for which Notices of Levy were filed on December 6, 1973 continue to be maintained after my extradition, I will not be able to defend against these tax obligations because, in all likelihood, I will be incarcerated and unable to raise bail on my arrival in Israel. There would be no realistic way for me to

communicate with my counsel and provide answers to any questions the Internal Revenue Service might have. Even if I were released on bail, the fact that I could not leave Israel would make it difficult for me to provide the information necessary for defense of the tax claim, but I would endeavor to do so as best I could.

SAMUEL SHAPIRO.

[Jurat omitted in printing]

(Ex. A to Memorandum of Points and Authorities in Support of Pltf. Motion for a TRO)

35

DEPARTMENT OF THE TREASURY—INTERNAL REVENUE SERVICE

DATE

NOTICE OF LEVY

Date: Dec 6, 1973

TO

Nanuet National Bank
Route 59
Nanuet, New York

INTERNAL REVENUE SERVICE

OFFICE OF ISSUE
Manhattan

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——————————> $ 92,720.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1040	12-31-70	12-6-73	132-32-8801	$ 6,843.68	6.00 L/F	$ 6,849.68
1040	12-31-71	12-6-73	132-32-8801	85,876.73	-0-	85,876.73
				TOTAL AMOUNT DUE		$ 92,720.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to the taxpayer for with respect to which you are obligated and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as is now or may be required by him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE: [signature] TITLE: Revenue Officer ADDRESS (CITY AND STATE): 120 Church St., New York, N.Y.

(Name and Address of Taxpayer)

Samuel SHAPIRO
200 Maple Avenue
and
4 Jona Lane
Nanuet, New York

CERTIFICATE OF SERVICE

I hereby certify that this notice was served by delivering a copy of this notice of levy to the person named below.

NAME: Barry Pallett
TITLE: Vice President
DATE AND TIME: Dec 6, 1973, 1 PM
BY (SIGNATURE AND OFFICE): [signature]

PART 3 — TO BE FURNISHED TAXPAYER

Form 668-A(DO) (10-71)

EXCERPTS FROM THE INTERNAL REVENUE CODE

SEC. 6331. LEVY AND DISTRAINT.

(b) SEIZURE AND SALE OF PROPERTY.—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) SUCCESSIVE SEIZURES.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) REQUIREMENT.—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special Rule for Life Insurance and Endowment Contracts.

(1) In general.—A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy.—Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings.—The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) ENFORCEMENT OF LEVY.—

(1) EXTENT OF PERSONAL LIABILITY.—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) PENALTY FOR VIOLATION.—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) EFFECT OF HONORING LEVY.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) ENUMERATION.—There shall be exempt from levy—

(1) Wearing Apparel and School Books.—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects.—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession.—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

(4) Unemployment Benefits.—Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered Mail.—Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain Annuity and Pension Payments. Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's Compensation.—Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Salary, Wages, or Other Income.—If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(b) Return of Property.—If the Secretary or his delegate determines that property has been wrongfully levied upon, it shall be lawful for the Secretary or his delegate to return—

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

APPLICABLE SECTIONS OF INTERNAL REVENUE CODE

6321. Lien for Taxes.
6322. Period of lien.
6325. Release of lien or discharge of property.
6331. Levy and distraint.
6332. Surrender of property subject to levy.
6333. Production of books.
6334. Property exempt from levy.
6343. Authority to release levy and return property.
7426. Civil actions by persons other than taxpayers.

FOR ADDITIONAL INFORMATION CONCERNING THIS NOTICE OF LEVY, PLEASE CONTACT THE PERSON WHOSE SIGNATURE APPEARS ABOVE THE NAME AND ADDRESS OF TAXPAYER.

BEST COPY AVAILABLE

37

(Ex 3 to Memorandum of Points and Authorities in Support of Plif. Motion for a TRO)

DEPARTMENT OF THE TREASURY – INTERNAL REVENUE SERVICE

NOTICE OF LEVY

December 6, 1973

TO

Chemical Bank
Route 59
West Nyack, New York

ORIGINATING DISTRICT
Manhattan

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——————→ $ 92,726.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1969	12-31-69	12-6-73	132-32-3.01	$ 6,643.68	$ 6.73 L/F	$ 6,650.41
1969	12-31-71	12-6-73	132-32-3002	85,870.73	-0-	85,870.73
				TOTAL AMOUNT DUE		$ 92,726.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on account thereof, to the extent provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the claimed tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Check or money order should be made payable to "Internal Revenue Service".

SIGNATURE: V.P. Collection Officer | TITLE: Revenue Officer | ADDRESS (CITY AND STATE): 120 Church St., New York, N.Y.

(Name and Address of Taxpayer)

Samuel STUPID
203 Maple Avenue
and
4 Joan Lane
Nanuet, New York

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME: H. R. Stewart
TITLE: Manager
DATE AND TIME: Dec. 10, 1973 2 PM
SIGNATURE OF REVENUE OFFICER: [signature]

PART 3 – TO BE FURNISHED TO TAXPAYER

Form 668-A (REV. 10-71)

EXCERPTS FROM THE INTERNAL REVENUE CODE

SEC. 6331. LEVY AND DISTRAINT.

(b) SEIZURE AND SALE OF PROPERTY. – The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) SUCCESSIVE SEIZURES. – Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) REQUIREMENT. – Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special Rule for Life Insurance and Endowment Contracts.

(1) In general. – A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy. – Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings. – The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) ENFORCEMENT OF LEVY. –

(1) EXTENT OF PERSONAL LIABILITY. – Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) PENALTY FOR VIOLATION. – In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) EFFECT OF HONORING LEVY. – Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (b)(2)), shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) ENUMERATION. – There shall be exempt from levy –

(1) Wearing Apparel and School Books. – Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects. – If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession. – So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value;

(4) Unemployment Benefits. – Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State or of the District of Columbia or of the Commonwealth of Puerto Rico;

(5) Undelivered Mail. – Mail, addressed to any person, which has not been delivered to the addressee;

(6) Certain Annuity and Pension Payments. – Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code;

(7) Workmen's Compensation. – Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico;

(8) Salary, Wages, or Other Income. – If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(b) Return of Property. – If the Secretary or his delegate determines that property has been wrongfully levied upon, it shall be lawful for the Secretary or his delegate to return –

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

APPLICABLE SECTIONS OF INTERNAL REVENUE CODE

6331 Lien for Taxes.
6322 Period of lien.
6325 Release of lien or discharge of property.
6331 Levy and distraint.
6332 Surrender of property subject to levy.
6333 Production of books.
6334 Property exempt from levy.
6343 Authority to release levy and return property.
7426 Civil actions by persons other than taxpayers.

FOR ADDITIONAL INFORMATION CONCERNING THIS NOTICE OF LEVY, PLEASE CONTACT THE PERSON WHOSE SIGNATURE APPEARS ABOVE THE NAME AND ADDRESS OF TAXPAYER.

39

(Ex C to Memorandum of Points and Authorities in Support of Ptlf. Motion for TRO)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

NOTICE OF LEVY

December 6, 1973

TO
Ford Motor
85 Water Street
New York, New York

INTERNAL REVENUE SERVICE

DISTRICT DIRECTOR
Brooklyn

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——— $ 92,726.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1040	12-31-70	12-6-73	132-32-8801	$ 6,843.68	$ 6.00 I/F	$ 6,849.68
1040	12-31-71	12-6-73	132-32-8801	85,876.73	-0-	85,876.73
				TOTAL AMOUNT DUE		$ 92,726.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE [signature] | TITLE Revenue Officer | ADDRESS (CITY AND STATE) 270 Church St., New York, NY

(Name and Address of Taxpayer)

Samuel SHAPIRO
205 Maple Avenue
Nanuy, New York

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME Ford Motor
TITLE Cash
DATE AND TIME 12/6/73 1:50 pm
SIGNATURE OF REVENUE OFFICER [signature]

PART 3 – TO BE FURNISHED TO TAXPAYER

FORM 668-A(REV. 10-72)

40

(Ex. D to Memorandum of Points and Authorities in Support of Ptlf. Motion for a TRO

December 6, 1973

TO
The Dime Savings Bank
Fifth Avenue & 48th. Street
New York, New York

INTERNAL REVENUE SERVICE

DISTRICT DIRECTOR
Brooklyn

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of ——— $ 92,726.41

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
1040	12-31-70	12-6-73	132-32-8801	$ 6,843.68	$ 6.00 I/F	$ 6,849.68
1040	12-31-71	12-6-73	132-32-8801	85,876.73	-0-	85,876.73
				TOTAL AMOUNT DUE		$ 92,726.41

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE [signature] | TITLE Revenue Officer | ADDRESS (CITY AND STATE) 270 Church St., New York, NY

(Name and Address of Taxpayer)

Samuel SHAPIRO
205 Maple Avenue
Nanuy, New York

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME [illegible]
TITLE [illegible]
DATE AND TIME [illegible]
SIGNATURE OF REVENUE OFFICER [signature]

PART 3 – TO BE FURNISHED TO TAXPAYER

FORM 668-A(REV. 10-72)

EXCERPTS FROM THE INTERNAL REVENUE CODE

SEC. 6331. LEVY AND DISTRAINT.

(a) SEIZURE AND SALE OF PROPERTY. – The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) SUCCESSIVE SEIZURES. – Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) REQUIREMENT. – Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special Rule for Life Insurance and Endowment Contracts.

(1) In general. – A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy. – Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings. – The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) ENFORCEMENT OF LEVY. –

(1) EXTENT OF PERSONAL LIABILITY. – Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) PENALTY FOR VIOLATION. – In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) EFFECT OF HONORING LEVY. – Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment to the extent of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) ENUMERATION. – There shall be exempt from levy –

(1) Wearing Apparel and School Books. – Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family.

(2) Fuel, Provisions, Furniture, and Personal Effects. – If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value.

(3) Books and Tools of a Trade, Business, or Profession. – So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

(4) Unemployment Benefits. – Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered Mail. – Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain Annuity and Pension Payments. Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and pensions based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's Compensation. – Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Salary, Wages, or Other Income. – If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(b) Return of Property. – If the Secretary or his delegate determines that property has been wrongfully levied upon, it shall be lawful for the Secretary or his delegate to return –

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

APPLICABLE SECTIONS OF INTERNAL REVENUE CODE

6321. Lien for taxes.
6322. Period of lien.
6325. Release of lien or discharge of property.
6331. Levy and distraint.
6332. Surrender of property subject to levy.
6333. Production of books.
6334. Property exempt from levy.
6343. Authority to release levy and return property.
7426. Civil actions by persons other than taxpayers.

FOR ADDITIONAL INFORMATION CONCERNING THIS NOTICE OF LEVY, PLEASE CONTACT THE PERSON WHOSE SIGNATURE APPEARS ABOVE THE NAME AND ADDRESS OF TAXPAYER.

42

(Ex. E to Memorandum of Points and Authorities in Support of Pltf. Motion for a TRO)

Banco Nacional Bank
206 Ponce St
Bayamon, Puerto Rico

Pursuant to the authority in section 6331 of the Internal Revenue Code and by virtue of a levy issued in my behalf by the District Director of Internal Revenue of the above-named District, I hereby seized (including all of the property but subsequently released from levy) the following described property on the date shown:

Due From	In the Amount of	Internal Revenue District (City and State)
Samuel SUPIN 202 Ponce de Leon and 6 John Lane Bayamon, Puerto Rico	$ 22,775.43	Manhattan District New York, New York

Description of Property

Contents of Safe Deposit Box No. 467

Signature of Revenue Officer	Address	Date
V.F. Gonzalez	Internal Revenue Service 120 Church Street New York, New York	December 6, 1973

Form 2433 Part 1 (Rev. 4-72)

BEST COPY AVAILABLE

1 United States District Court for the District of Columbia

[Title omitted in printing]

TRANSCRIPT OF PROCEEDINGS

• • • • •

[Thursday, December 13, 1973; pages 1–68]

The above-entitled cause came on for hearing on temporary restraining order before THE HONORABLE CHARLES R. RICHEY, United States District Judge, commencing at 3:30 p.m.

APPEARANCES

On behalf of the plaintiffs: *Nathan Lewin, Esq.* and *Martin D. Minsker, Esq.*

On Behalf of the defendant State Department: *Murray Stein, Esq.*, Justice Department.

2 On behalf of the defendant Commissioner of Internal Revenue: *Stephen G. Fuerth, Esq.*, Tax Division, Justice Department.

On behalf of the Acting Attorney General: *Robert S. Rankin, Jr., Esq.*, Assistant United States Attorney.

• • • • •

3 PROCEEDINGS

The DEPUTY CLERK. Civil Action 2172–73, Shapiro versus the Secretary of State.

Mr. Lewin, Mr. Rankin, Mr. Stein, and Mr. Fuerth.

Mr. LEWIN. Ready for the plaintiffs, Your Honor.

Mr. RANKIN. Ready for the defendants, Your Honor.

The COURT. Let me inquire: Has the Government had the opportunity to sufficiently familiarize themselves with the pleadings to be able to argue the matter successfully or fully?

Mr. RANKIN. Your Honor, to my knowledge, the U.S. Attorney has not been served with a courtesy copy of the pleadings.

However, the Department of State and Department of Justice have been served.

They brought over a short while ago copies of the papers out, looked at them briefly, but have not thoroughly read them. These gentlemen are somewhat familiar with the case, having dealt with it before.

The COURT. Who is Mr. Stein? What agency does he represent?

Mr. RANKIN. He is from the Department of Justice, Your Honor.

The COURT. And Mr. Fuerth?

Mr. RANKIN. Mr. Fuerth is also with the Department of Justice in the Tax Division. Mr. Stein knows about the extradition portion of the case.

4 The COURT. Mr. Stein is assigned to what division in Justice?

Mr. STEIN. Criminal.

The COURT. All right.

I take it then that you are, with the help of your two colleagues, Mr. Stein and Mr. Fuerth, able to go forward with respect to at least the TRO today?

Mr. RANKIN. We think so, Your Honor.

The COURT. All right.

May I also inquire as to this—and I want both counsel, that is, counsel on both sides to correct the Court if the Court is in error:

I have had a brief opportunity to examine the pleadings in the privacy of my chambers. I did not get through the complete reading of the entire pleadings, but I read most of them and I think I have an understanding of what's happened here. And I want to see if my understanding of the facts is correct and maybe, therefore, we will save some time.

The one that seeks the relief, that is, the plaintiff, Mr. Shapiro, here, has been indicted in the State of Israel. And there were extradition proceedings held in the State of New York, I believe in the Southern District.

Mr. LEWIS. Yes, Your Honor.

The COURT. Well, if you will just sit . . .

Mr. LEWIN. Oh, I'm sorry.

572-247 O - 75 - 3

The COURT. I want you to be seated, sir. You will have plenty of opportunity to talk all you want.

[Both Mr. Lewin and Mr. Rankin sit down.]

The COURT. The State Department was brought into this picture after bond was posted in New York. And the plaintiff represented to the State Department and to the United States Government representative that he felt that he could secure an acquittal of the charges against him brought by the State of Israel.

He wanted to be sure, however, that if he were extradicted and sent back to Israel, that they would release him on bond pending the trial of his case.

Also, he did not want to be extradited after the order was entered until such time as his wife, an American citizen, had had her baby.

I understand from the pleadings in addition to what I've said, the baby was born on December 9th of this year; and that subsequent thereto and before the date set for his departure from the United States the plaintiff, Mr. Shapiro, had his accounts seized by I.R.S.

Now, that's as far as I have gotten. Are those facts substantially correct?

Mr. LEWIN. Yes, Your Honor, the facts are substantially correct.

The COURT. All right.

6 In what respect are they in error?

Mr. STEIN. Your Honor, if I may . . .

The COURT. Surely.

Mr. STEIN. I would like to clear something up.

The DEPUTY CLERK. Your name, sir?

Mr. STEIN. Mr. Stein.

I would like to make something clear that could have a false impression in Your Honor's mind, and that's the fact that the State Department did not enter the case until after the Courts of the United States had sustained the finding of extraditability against Mr. Shapiro.

The COURT. All right.

Mr. Lewin.

How do you pronounce your name so that I won't embarrass you, sir?

Mr. LEWIN. Lewin, Your Honor.

The COURT. Lewin?

All right. Then I was correct on that, too?

Mr. LEWIN. Right, absolutely right.

The COURT. All right.

In what respect was the Court's recital of the facts, so far that I know them, incorrect?

Mr. LEWIN. The only—the only point—the matter I can point to which is really an irrelevancy there, which is the date that Mr. Shapiro's child's birth, which was November

7 15th, not December 9th.

The COURT. It was not December 9th?

Mr. LEWIN. No, December 9th was the date that was agreed upon by Mr. Shapiro and the Department of Justice and the Department of State and the Government of Israel for his voluntary surrender.

The COURT. To the U.S. Marshal in New York?

Mr. LEWIN. To the U.S. Marshal in New York, and for his departure from the United States.

There is one other point which I think is relevant which I think Your Honor omitted in his recitation, which is that after the matter was litigated in the Courts in New York, a petition for Certiorari was filed with the Supreme Court of the United States.

The COURT. I forgot that. I'm glad you reminded me.

Mr. LEWIN. And that was really the basis, the consideration, as it were, for the agreement—part of the consideration for the agreement to go forward.

The COURT. I understand it has not been acted on yet.

Mr. LEWIN. Well, no, it was voluntarily dismissed by the petitioner pursuant to the arrangement that he had.

The COURT. Oh, I see.

Mr. LEWIN. In other words, what happened was, we were petitioning from the decision of the Second Circuit,

8 which took about—it was a long opinion by Judge Friendly—about 35 pages, and there were many legal issues there.

We petitioned from that decision, and it was at that stage that the discussions for voluntary surrender were begun and were concluded with an exchange of diplomatic notes.

However, the offer was given to the State of Israel by the Department of State, simply transmitted. The State of Israel made a formal response by a diplomatic note; and there was an exchange thereafter, another diplomatic note from the Govern-

ment of Israel; and everything was all arranged for the departure on December 9.

During all of this period of time, it was a matter of public notice to everybody that certainly was at all interested in Mr. Shapiro that he was under an order of extradition and that, therefore, he would be leaving the United States.

That was known—I think there really can't be any doubt about it that that was known by the Internal Revenue Service.

There was not a word during that period of time. And this also, I think, was a critical factor—not a word during that entire period of time from the Internal Revenue Service as to any question whatever regarding Mr. Shapiro's taxes for the years 1970 and 1971.

He was here for only a small part of 1970; and in 1971, he filed an income tax return. That was before he was married.

There was no question in any point about his taxes.

And he steadfastly maintained and does so in an affidavit filed with the papers that he owes no taxes and that his tax returns were accurate.

Notwithstanding this total absence of action over a course of what I think was a year by the Internal Revenue Service, they waited until literally one business day before he would leave the United States—and before they knew he would leave the United States—to take this very extraordinary remedy that the Internal Revenue Service gives them and that the Courts have sustained, in the language of Justice Brandeis, "only when there is an adequate opportunity afforded for a later judicial determination of legal rights."

That's the language of Justice Brandeis in the original landmark decision that has been cited over and over again.

The COURT. If that is in your papers, in what paper is that?

Mr. LEWIN. It's in our memorandum in support of the temporary restraining order.

The COURT. All right.

Let me see, Mr. Lewin, if I can find it.

[The Court looks through his papers.]

The COURT. What page?

Mr. LEWIN. It appears—it's quoted at pages 14 and 15. At the top of page 15, quote: . . .

The COURT. Hold on.

I can't go quite as fast as you can.

[The Court continues to look for the reference in question.]

The COURT. Is there anything in the agreement or arrangement whereby Mr. Shapiro after his extradition would take the money with him to post as a bond to secure his release in Israel pending trial there?

Mr. LEWIN. There was no specific reference to any funds being taken with him, Your Honor. But prior to entering and concluding the agreement, I wrote directly to the Attorney General of Israel to ask him what amount would be set for bail. I was advised that it would be 250,000 Israeli pounds.

I have checked with Mr. Shapiro . . .

The COURT. That represents how much in American . . .

Mr. LEWIN. That represents about . . .

The COURT. . . . money?

Mr. LEWIN. . . . close to $60,000.00 in American money.

The COURT. That's more than the $55,000.00 posted here.

Mr. LEWIN. That's more than the money that Mr. Shapiro has here. And the way it is here . . .

The COURT. Does he have money in Israel?

Mr. LEWIN. No, but he has a family. His father has an apartment that is going to be mortgaged with the bank in Israel.

The arrangements that were made and the reason that it was possible for him to be . . .

The COURT. Is it a condominium in Israel?

Mr. LEWIN. It is an apartment.

I think everybody buys apartments in Israel, as I understand it.

The COURT. It must be under a condominium or semi-type arrangement.

Mr. LEWIN. Some kind of arrangement of that kind.

And that is to be mortgaged in Israel to make up the balance that would make up the bank guaranty under which he would be released.

The COURT. Well, let me ask you this: Aside from the constitutional argument which you make which on its face may well have merit and which I hope this Court will always remain sensitive to, how will the Government of the United States protect itself if this man is extradited and these same monies that are now under the I.R.S. levy are released and used to post bond in Israel and for some reason the Israeli Government and the judicial machinery there order the forfeiture of the bond?

How will the I.R.S. in this country then be able to collect money, too?

Mr. LEWIN. If I might just . . .

The COURT. What security can you give to the United
12 States Government?

Mr. LEWIN. If I might just give two answers to that, Your Honor.

One is that the interest that the Internal Revenue Service presently has in these funds are subordinated to Mr. Shapiro's appearance in any event, because the very same funds have posted to as security for his appearance to surrender to the Marshal now this coming Sunday to be extradited.

If, in fact, Mr. Shapiro were in bad faith to flee or not appear for extradition, then that money would first be forfeited in any event because he would not be present.

So that to the extent that Your Honor is saying, "Well, what would happen if Mr. Shapiro, for some reason or other, would forfeit that bond in Israel?" the Internal Revenue Service is really under the very same threat, as it were, or the very same potential risk with the levy that is served right now.

The COURT. I don't understand that because the monies will be posted in Israel.

Mr. LEWIN. Well, that goes to my second answer, which is that I have proposed to the Internal Revenue Service—and they are here with the papers—what I feel is a compromise.

It's not, as it seems to me, an entirely satisfactory compromise from the plaintiff's point of view because it involves the money remaining in the United States; but it is a proceeding whereby the money would be transferred to the New
13 York branch of an Israeli bank, which would hold it, issue its guarantee in Israel, and the I.R.S. would take subordinate to that interest.

The COURT. In other words, you would give the Israelis prior lien, in effect?

Mr. LEWIN. I'd give them a prior lien, right.

But I think that is the only way that it can be worked out so that he can be released on bail in Israel, and if . . .

The COURT. You haven't heard from the I.R.S.?

Mr. LEWIN. No, I have not heard from the I.R.S.

But I have discussed that with them in person. I've had a letter read to them on the phone. It has something to do, I

suppose, with the mail deliveries; but they say that they have still not received the letter in hand.

The COURT. All right.

I think I understand your position, and I will give you full opportunity to make further argument.

Let me hear from the Government now. I want to ask them some questions.

Mr. Rankin?

Mr. RANKIN. Yes, Your Honor.

The COURT. Perhaps Mr. Fuerth can answer this question better than anybody else, although I say that without any adverse reflection on you.

Mr. RANKIN. Not at all, Your Honor.

The COURT. I am sure there is no more effective ad-
14 vocate anywhere than you are.

Why hasn't the I.R.S. responded to counsel's suggestion in a letter?

Mr. FUERTH. Well, Your Honor, I checked just before. We basically have not gotten the response yet, but I have checked with the appropriate authorities. And while they haven't formally acted on it, it is their information that the offer is not acceptable and if they were to ask—I must be quite frank Your Honor: If they were to ask my advice, I would tell them it was not acceptable because, in essence, what counsel proposes is that—I am taking the facts as he presents them—we now have a second lien. He proposes that we make a third lien.

In other words, we now have—we now will get the money . . .

The COURT. . . . subject to a first deed of trust or a first mortgage.

Mr. FUERTH. Subject only to Mr. Shapiro appearing this Sunday to turn himself in.

If he turns himself in, then that bond, of course, will not be forfeited and the money will be paid to us.

Now, counsel suggests that we should not only subordinate ourselves . . .

The COURT. Would you get the money anyhow?

Mr. FUERTH. No, if—some of the money, not all of it. You realize there is . . .

15 The COURT. How much will you get if he turns himself in on Sunday?

Mr. FUERTH. I understand from counsel $55,000.00 I understand that that's the amount of money that is on deposit.

Is that correct, counsel?

The COURT. I understand that that is on deposit.

Mr. FUERTH. Yes.

The COURT. But how much is owed?

Mr. FUERTH. Oh, I'm sorry, Your Honor, $90,000.00. The tax assessment was $90,000.00.

The COURT. How long has that assessment been outstanding?

Mr. FUERTH. That assessment was made on December the 6th.

The COURT. Of this year?

Mr. FUERTH. Of this year, yes.

The COURT. Well, why did you wait so long to do it?

Mr. FUERTH. We were conducting an investigation, and this was the time we felt was appropriate to make it. The law merely requires that we make an assessment within three years of the date that a return is filed unless we show fraud.

We are given three years pursuant to the provisions of Section 6501, Title 26, to make an assessment. And, of course, . . .

The COURT. Can you tell me the bases for a levy?

Mr. FUERTH. For a levy or for an assessment, sir?

16 The COURT. Well, for a levy and assessment here.

Mr. FUERTH. The basis for an assessment is that there was unreported income in the years 1970 and 1971, income that was not reported on his return.

The COURT. Do you have any evidence that you can present to the Court to verify that?

Mr. FUERTH. No, Your Honor, not today.

Your Honor, if I may suggest—and I am prepared to make an argument on that—I would suggest, Your Honor, that this Court lacks the necessary jurisdiction to question the merits of either the assessment or the making of the jeopardy assessment.

This specifically prohibited by statute, Section 7421 of the Internal Revenue Code, which prohibits the Court from enjoining into the assessment or the collection of the tax.

The COURT. That's in 7421?

Mr. FUERTH. Yes, of Title 26.

The COURT. I know that much.

[The Court looks for the reference in question.]

The COURT. Well, there are obviously certain exceptions.

Mr. FUERTH. Yes.

The COURT. . . . to the prohibition of suits to restrain the assessment or collection of taxes.

Mr. FUERTH. Yes, Your Honor.

The COURT. Now . . .

17 Mr. FUERTH. I can explain, Your Honor, if you wish.

The COURT. What are those exceptions?

Mr. FUERTH. There are two basic exceptions and there is one judicial exception.

The COURT. All right.

Mr. FUERTH. The first exception is that unless this is a tax covered by Section 6213—and that is the requirement for the extending of a statutory notice of deficiency.

Now, if Your Honor will bear me out, I will just backtrack slightly here.

The COURT. Well, why don't you go to 6212 first (a) and (c).

Mr. FUERTH. Well, 6212 and 6213 are tied together.

Let me explain the system of taxation in this sense: When the Commissioner has determined that there is a tax deficiency owed, he makes that determination; and in the normal case, he sends a statutory notice of deficiency, which is in common parlance is known as a ticket to the Tax Court, which upon receipt by a taxpayer, the taxpayer has a right to petition the Tax Court for a redetermination of his deficiency.

And Sections 6212 and 6213, in essence, say that an assessment may not be made unless the taxpayer has first received the statutory notice of deficiency and has had an opportunity to go to the Tax Court.

However, Section 6861, which is the provision for

18 making a jeopardy assessment, and 6212 and 6213 specifically exempt this requirement for first giving a statutory notice in the case of a jeopardy assessment, which we have here; and requires the statutory notice, rather than being delivered before the assessment is made, but be given 60 days after the making of the assessment.

So in this case we must send to Mr. Shapiro a statutory notice of deficiency on or about February 6th. Upon receipt of that statutory deficiency, he will have an opportunity to petition the Tax Court for a redetermination of his taxes.

If the Tax Court finds that he does not owe either any of the amounts or some portion, the tax will be reduced and any monies so collected will be refunded together with interest.

The COURT. All right.

You say he could also pay the taxes and come into this Court?

Mr. FUERTH. That's right.

He can pay the taxes and file a claim for refund, wait six months, and come into this Court . . .

The COURT. Come into this Court or the Court of Claims.

Mr. FUERTH. That's right.

The COURT. All right.

Now, what does 7426(a) apply to?

Mr. FUERTH. 7426(a) concerns claims by non-taxpay-
19 ers stating that their property was wrongfully levied.

In other words, Section 7426 gives a non-taxpayer relief to sue the Government directly in saying, "You have taken my property for the collection of someone else's taxes."

It specifically applies only to non-taxpayer, that section would not apply.

The COURT. All right.

Now, you are saying . . .

Mr. FUERTH. The only other . . .

The COURT. Go ahead.

Mr. FUERTH. The only other exception, Your Honor, is the exception set forth in the case of Enoch versus Williams Packing, which is 370 U.S. 1, which I am sure Your Honor is familiar with.

E-n-o-c-h-s.

The COURT. It is just Enoch; there is no "s" on it.

Mr. FUERTH. There isn't? Well, . . .

The COURT. Actually, if you've read the newspapers recently, I issued an opinion on that and your agency . . .

Mr. FUERTH. Yes, Your Honor, I am well aware of that.

The COURT. . . . within the last 48 hours, and that was one of the cases that we relied upon.

Mr. FUERTH. Yes, sir.

And, as Your Honor will recall, in that case the Supreme Court laid down two conditions for the granting of an
20 injunction; i.e., that, one, the taxpayer must show in its pleadings that under no circumstances could the Government ultimately prevail; and, two, there must be a basis for the granting of equitable relief, that there is not an adequate remedy at law.

In this case, Your Honor, I do not believe the pleadings by themselves show any basis at all for coming to that conclusion. They don't discuss the tax liability itself.

And, secondly, and I will say more importantly, the taxpayer clearly has an adequate remedy at law by either going to the Tax Court or filing a refund suit.

The COURT. All right.

Now, Mr. Stein . . .

Mr. FUERTH. Mr. Fuerth, Your Honor.

The COURT. Mr. Fuerth?

Mr. FUERTH. Certainly, Your Honor.

The COURT. The Government of the United States or any part or agency thereof or any official has always got to act in good faith, with the appearance of propriety at the very minimum, wouldn't you agree to that?

Mr. FUERTH. I do, Your Honor.

The COURT. Now, there isn't any question in this case but that there were negotiations between the Government of the United States and the counsel for plaintiff in the case at bar.

Mr. FUERTH. Yes.

21 The COURT. And that pursuant to that, there was an agreement made or entered into.

Mr. FUERTH. Well, I don't think I could agree with that, Your Honor.

The COURT. Well, let me just see something.

Mr. FUERTH. Yes, Your Honor.

The COURT. I have an affidavit before me that that is the case; and if it is not the case, Mr. Shapiro could be exposing himself for prosecution for perjury.

Mr. FUERTH. That is right, Your Honor.

The COURT. That's not true?

But I have to take it as true for the purpose of these proceedings, and I am going to do it on that basis unless you can show me the Court is in error in doing that.

It seems to me that the case law, as you impliedly agree, requires before a notice like this can be given or before a deficiency can be asserted, that Mr. Shapiro is entitled to have his day in court and have an opportunity to litigate the legality of the jeopardy assessment. And these jeopardy assessments were made in this case long after the agreements between Mr. Shapiro and the Government of Israel and the Government of the

United States were entered into. There isn't any question about that.

Mr. FUERTH. Well, Your Honor, the difficulty I have
22 here is that I recognize that Mr. Shapiro has entered into an agreement or has received some promises from the State of Israel.

The COURT. Received promises from the Government of the United States.

Mr. FUERTH. That, Your Honor, is where I think we differ. From all I understand of the facts, that's not true.

The COURT. All right.

Let's look at the pleadings.

[The Court and counsel look at the pleadings.]

The COURT. "The State Department through the office of the Legal Advisor communicated with the Embassy of Israel to see whether this case could be amicably resolved under certain conditions.

"A diplomatic note, dated August 16, 1973, was delivered to the Embassy of Israel, asking whether or not it would approve of these conditions."

Then on September 4 of this year, the Embassy replied to the request by agreeing to three conditions in exchange for the withdrawal of the petition for Cert and the voluntary surrender of the plaintiff.

The three conditions were that extradition would be delayed until after the birth of the plaintiff's child and the religious ceremonies incident thereto; that the plaintiff would be
23 released on bail on his return to Israel; and that the trial in Israel would not be interrupted by extended delays.

Now, all of this was agreed to.

Mr. FUERTH. Well, Your Honor, in fairness . . .

The COURT. Just a minute.

In paragraph 12, we have an allegation which says the following, and I quote: "On the basis of the representation made to him and the request by the Department of State that he take steps immediately to withdraw the position for writ of Certiorari, as reflected in Exhibit 1 attached to the complaint, plaintiff's counsel drafted and submitted for signature by the Solicitor General a stipulation signed by the Solicitor General of the United States and by plaintiff's counsel, which is also attached as Exhibit 2.

"And then by another diplomatic note, dated November 9, 1973, the Government of Israel restated its agreement to permit release on bail, 250,000 Israeli pounds, and the contents of that diplomatic note were communicated to plaintiff's counsel in the other dated note November 21, 1973, which is attached as Exhibit 3."

Then the baby was born on November 16th, and the proper people were informed.

There was never, according to paragraph 16 of the complaint, if you will look at it—do you have it before you?

Mr. FUERTH. Yes, I have.

24 The COURT. It's made to appear—and I remind you, Mr. Fuerth, that this is under oath—"That plaintiff's counsel made clear that in order to post the bail required by the State of Israel, Mr. Shapiro would have to utilize funds counter-pledged as security for his appearance in the proceedings before I.R.S. and the District Court; and at the suggestion of an official at the Embassy of Israel, arrangements were made with an Israeli bank to deposit these funds in a New York Branch of that bank, with the Department of Security for that bank to guarantee Israel there was a bail to be posted upon Mr. Shapiro's return to that country."

Now, then you see what it says in paragraph 17.

Mr. FUERTH. Yes, sir.

The COURT. That "Arrangements were further made with the United States Immigration and Naturalization Service that monies would be deposited in the Israeli bank of the United States so that a bank credit could be given in Israel to secure his release on arrival in that country."

Then you did what you did on December 6th without any prior notice of warning whatever and came in and seized all his assets.

It seems to me that the Government of the United States has breached its agreement with this plaintiff. That's the way I see it, according to the bare allegations of the complaint.

Isn't that what it says?

25 Mr. FUERTH. Well, Your Honor, first of all, I must . . .

The COURT. Mr. Fuerth, isn't that what the complaint says?

Mr. FUERTH. I see nothing in the allegations of the complaint that say that we would allow him to have this money available.

I see nothing in the allegations of the complaint that we would not make it jeopardy.

I see nothing in the allegations of the complaint that says he doesn't have to pay his income taxes.

The COURT. I didn't suggest that there was.

Mr. FUERTH. Yes, Your Honor, but the point is the I.R.S. was only aware of one thing: It was aware that the man was being extradited; it was aware that there were immigration proceedings against him, that he was an illegal immigrant in this country.

It was well aware and from these facts it could draw one possible conclusion: That once he left the United States and once these funds left the United States, any opportunity to collect them would be gone. We cannot go to Israeli courts to collect taxes.

The COURT. Let me ask you this: Were you aware that the State Department was negotiating with the Embassy of Israel?

Mr. FUERTH. We were not aware of it.

The COURT. Were you in touch with the U.S. Attor-
26 ney's Office conducting the extradition proceedings?

Mr. FUERTH. As I understand it—and I will say this, Your Honor: I have not talked to the actual people who were working on the case because they are out in the field today.

But from my brief calls to New York, I am told that all we knew from the U.S. Attorney's Office was the fact that extradition proceedings were in progress; we knew that he was scheduled to leave December 9th; but we did not know of any of the other information.

The COURT. May I ask you one last question . . .

Mr. FUERTH. Certainly.

The COURT. And then you can make whatever argument you want to.

Mr. FUERTH. All right.

The COURT. I want to be completely fair to the Government as well as to Mr. Shapiro.

What harm is going to come to Mr. Shapiro or the United States Government to give him an opportunity to have an expedited hearing on whether or not his assessment was proper before he is extradited?

Mr. FUERTH. What harm, Your Honor?

The COURT. Yes.

Mr. FUERTH. For the simple reason that you are going outside the normal and expressly set-up channels for litigating a tax liability by doing it in this Court.

27 In other words, he will properly get the statutory notice. He could pay the tax today and file an action in the Federal Court within six months.

That's proper relief.

The COURT. In the meantime, he is going to be extradited to Israel; he is not going to be able to produce the funds; and he is going to be put in jail; he is not going to be able to locate witnesses; and he is not going to be able, therefore, in all probability, to secure his acquittal.

It seems to me that the Government has got to find some way to treat even an alien illegally in this country in accordance with the standards of fundamental due process.

Bear in mind that this man is married to an American citizen; it may be that he might be ultimately entitled to an adjusted status, be that as an immigrant at the very least; and also an ordinary citizen of the United States is entitled to go through the procedures that are already outlined.

Now, as a practical matter, you and I know, Mr. Fuerth, that if he has to be extradited or is, in fact, extradited on Sunday of this week, namely December 16th. Mr. Shapiro is going to be found in Israel in one of their jails or concentration camps or whatever they have there.

And thus he is going to be penalized and not be in an effective position to litigate his feud with the client that you serve so effectively in this Court.

28 Mr. FUERTH. Again, I see no reason why he can't be represented by counsel.

The COURT Well, he is being represented by counsel but thousands of miles away in the State of Israel.

Mr. FUERTH. In the average Tax Court case, the defendant is not represented—counsel—in many cases, counsel deals with them strictly by letters.

The COURT. I understand. I understand.

But there may be far more to this than you and I are aware of, because you haven't been able to talk to the agent yourself and obviously the Court hasn't. I just have a bare fact complaint before me.

Mr. FUERTH. That's correct, Your Honor.

The COURT. I just don't like to see any agency of the Government, including the Court, I might add, act in a manner that is heavy-handed that doesn't comport with justice in its most liberal sense of the words.

And if a Court or a Governmental agency acts in any fashion, even though lawful, that has the net effect and result of denying somebody effectively an opportunity to fully participate in a matter of a dispute with the Government—that would be the case if a man were in jail in a foreign land, even though he is a native of that country; and we know that is going to be the case from the allegations here; we have to assume it for the purposes of this hearing—I don't think that that comports on its face with fundamental fairness.

29 It seems to me we ought to be able to find some way to (a) delay the extradition; (b) make a determination as to the propriety, the legality of the assessment; and then extradite him if that is the decision of the Government—and, apparently, it is. I won't quarrel with that. That is not before the Court.

But there ought to be some way in all of the law of the Constitution of the United States to give this man an opportunity to litigate this, even though I agree with you that some tax cases are litigated through counsel by way of mail.

It may be that they do in Israel what they used to do in this country: Not let prisoners write letters.

Do you know that?

Mr. FUERTH. No, I am not familiar with Israeli laws.

The COURT. Well, it wasn't until recently until some sensitive, hopefully one like the one you happen to be looking at right now, that prisoners were able to write letters to their counsel or even to confer with their counsel while they were incarcerated in institutions. When they had made application for parole and release, they were not even given a statement of the reasons. Now, we are making some progress and finally we are at least doing that. They are now allowed to have visitors and so forth.

How do I know what the conditions are in Israel and

30 you don't know either.

It just seems to me to have the appearance of being heavy-handed, and there ought to be some way within the Department of Justice, if I may emphasize the word "Justice," to see that this man is treated fairly here in accordance with

what obviously was an agreement concerning this tax problem.

Mr. FUERTH. Well, Your Honor—I'm sorry.

The COURT. I have said all I am going to say. I will listen to you.

Mr. FUERTH. Well, Your Honor, may I for the moment assume that your argument is directed to the second part of the Enoch case. Essentially, you are saying that under the circumstances, he would not have an adequate remedy.

The COURT. That's basically it, of course.

Mr. FUERTH. But the Supreme Court has laid down a two-part test: The Supreme Court has laid down a test to say, not only must a man come in to show that he doesn't have an adequate remedy; but he must also by well-pled facts show that under no circumstances could the Government prevail.

Now, I have read through the complaint and I have read a lot of allegations about the purported agreement between the State Department and the State of Israel. But I have read nothing in this complaint other than a bare and conclusionary allegation that this man doesn't owe the tax.

He hasn't said what his income was. He hasn't come

31 forth with any allegation whatsoever that he would by any reason of the law support an allegation that the Government could under no circumstances ultimately prevail.

Now, I must confess, Your Honor. . . .

The COURT. That's a good argument.

Mr. FUERTH. I've seen many . . .

The COURT. If I were in your shoes, I would try to make it, too; but I also would try to find some way, if I could in good conscience, consistent with the rights of my client, at least have enough delay to allow a litigated determination of this matter if it can't be compromised.

Mr. FUERTH. But the point is, the Supreme Court has said that the reason they don't want to grant injunctions—the reason they don't want the Court to interfere except in special extraordinary circumstances—is that the collection of the revenue is so important; and that they feel, the Supreme Court, that although the other remedies, in effect, force delay—in other words, they require a man to pay now and litigate later.

In fact, this may mean financial hardship; it may mean in some instances if the taxpayer has even shown that he doesn't have the money to pay the taxes—in other words, he has waived

572-247 O - 75 - 4

his right to go to Tax Court—he now comes and says: "I couldn't pay this assessment."

But, nevertheless, the Courts have uniformly not seen that as a basis for granting injunctive relief before the
32 revenue is collected.

In other words, the Supreme Court has seen—and the Congress believes—that to allow this injunctive intervention prior to the collection process could bring Government to a screeching halt.

The fact is that every taxpayer could come into this Court and for one reason or another ask this Court to rule on the collection of his tax before it's collected, I don't think any of our salaries are going to be paid.

The COURT. Sir, you couldn't be more right in a technical sense.

But how many cases in your career in the Government—and I assume that you have served as a career public servant for a number of years——

Mr. FUERTH. Yes, sir.

The COURT. . . . have you ever had a man in a situation similar to that of Mr. Shapiro here?

Mr. FUERTH. I have not, I must confess, Your Honor, . . .

The COURT. You have never seen a case like this?

Mr. FUERTH. Not with identical facts, Your Honor.

I have seen many cases, many cases, in which the facts are as harsh, if not equally harsh. And just as an example, Your Honor, I would refer Your Honor to a case called Enterprises Unlimited versus Davis in the Ninth Circuit.

The COURT. I will have my law clerk make a note of it.

33 Mr. FUERTH. As I say, it has no relation other than . . .

The LAW CLERK. Enterprise Unlimited?

The COURT. Enterprises Unlimited what?

Mr. FUERTH. Enterprises Unlimited, Inc. versus Davis.

The COURT. . . . versus Davis, Ninth Circuit.

What year?

Mr. FUERTH. Ninth Circuit, I believe it's '65 or '66.

The COURT. All right.

We will look at it.

Mr. FUERTH. Let me, Your Honor, show you the related facts in the case.

And in that particular case, a tax case, a woman who was not married to a man but who filed a joint tax return—the husband allegedly took the case to the Tax Court.

She alleged she had no knowledge of it. She alleged that she had been coerced into signing the return. She brought it.

And based upon the Tax Court action, which she claimed she had no notice, or which she claims she didn't employ a lawyer to represent her—the lawyer was not authorized to enter the stipulation, a very large assessment was determined against her.

Then the alleged husband died. The Government, on the basis of this assessment, came looking for her; seized her property.

34 She went into the District Court for the District of Nevada to attempt to get an injunction. And the Court, applying the standard of Enoch, said, "You haven't made out the basis for getting injunctive relief," notwithstanding the fact that at that particular point in time it did not appear that she had any remedy; because, at that point in time, you could not even go into the Tax Court to reopen a case.

The COURT. All right.

Mr. FUERTH. Ultimately, I will say, some four or five years later, through the diligence of counsel, she was able to reopen the Tax Court; and, ultimately, the Ninth Circuit did set aside the Tax Court decision and did give her the relief.

But I am merely pointing out . . .

The COURT. Wouldn't that be a terrible tragedy in this case if this man were sent to Israel under this order of extradition, languished in jail over there and convicted because he technically might not have met the requirements of the statute or the Enoch standards and he were erroneously convicted, would you want that kind of blood on your hands?

Mr. FUERTH. Well, I guess, Your Honor, where I fail to see—and I don't believe in our Court—it is necessarily denial of due process where a man can't make bail that he can't defend himself.

The COURT. Pardon?

Mr. FUERTH. If a man can't make bail in this country
35 and he is allowed to be in jail, that doesn't constitute a denial of his right to defend himself. I presume it happens in this Court all the time.

The COURT. You are not here very often then.

Mr. FUERTH. Well, I . . .

The COURT. We've got a new Bail Reform Act enacted by the Congress of the United States, which Mr. Rankin can tell you about even though he works on the civil side exclusively.

But practically everybody has to be admitted to bail no matter what the crime is.

Mr. FUERTH. That's true.

The COURT. It's very difficult to incarcerate somebody. Isn't that right, Mr. Rankin?

Mr. FUERTH. But, Your Honor, it is still not denial of due process if . . .

The COURT. Well, that's one of the reasons.

Mr. FUERTH. . . . the person meets the other conditions and this Court does not grant him bail—and this is a proper denial of bail—that is not a basis to not count crime or say he is denied his due process.

The COURT. Well, what I am trying to say to you, Mr. Fuerth, is that isn't there some way we could reach a middle ground here that's legitimate, lawful, and proper?

Mr. FUERTH. Well, Your Honor, short of either paying the tax or going to the Tax Court, I don't know of any.

36 The COURT. All right.

Mr. FUERTH. And Your Honor, I would be very happy to inquire as to when the statutory notice of deficiency will be forthcoming. In the shortness of time, I couldn't find out.

But short of that, Your Honor, I would submit that again that the Court just lacks enough jurisdiction to do that.

The COURT. Well, it may be. It may be.

The COURT. Is there anybody else on the Government's side that wants to argue because I've asked a lot of questions?

Mr. RANKIN. Yes, Your Honor.

The COURT. I think Mr. Rankin has got a frown on his face.

Mr. RANKIN. Well, Your Honor, I think—I did not get up and make a factual statement earlier.

The COURT. All right.

Mr. RANKIN. And we took up the fact issue.

I would like, if I could, to put this case in perspective as to the way I've seen it in the last hour and a half.

We talk about fundamental fairness, and what we have here is an individual who is illegally in this country.

It is my understanding that when in Israel, he was under a criminal complaint with a possible co-defendant. The plaintiff left Israel before the indictment came down. A co-defendant was tried and was sentenced to three years in jail. And it is my understanding that he was considered an accessory.

37 The plaintiff here was in this country illegally, and he is under deportation proceedings.

When the Government of Israel, pursuant to treaty obligations or pursuant to a treaty, asks the Department of State to institute the extradition proceedings—extradition proceedings were carried out in the Southern District of New York.

The plaintiff was there to defend himself. He was denied release. That was appealed. He was again denied release.

He filed a petition for writ of Cert in the Supreme Court. He sought a stay of the extradition but was unable from any Court to get a stay.

So, for all intents and purposes, at that time he was clearly extraditable.

Now, the Government—the Secretary of State—could have signed a warrant of extradition at that moment by law and the man would have been extradited.

No. Plaintiff then comes in with a request that he be allowed to remain in this country because his wife was to have a baby. The Department of State did not have to consider that.

They came in and said: "We would like for Israel to agree to three conditions." Now, the Department of State was really acting as in intermediary here.

They posed these proposed conditions as plaintiff had set forth in a letter to Israel. Israel did not agree to those conditions as posed by the plaintiff.

38 Rather, the Government of Israel, we would proffer to the Court, as to one of those conditions said: "The Government will not oppose his application for bail when he comes back to this country. It is obviously up to the Court to impose, and we simply agree that we will not oppose it," which, Your Honor, is substantially different from the Government saying, "Yes, we guarantee he will be released on bail."

So I would submit to this Court that subsequent to that time, after getting assurances from Israel as conduit through the Department of State as to what Israel was willing to do, the plaintiff then withdrew petition for writ of Cert in the Supreme Court.

Now, there is a stipulation in the record where the plaintiff's attorney stipulated with the Solicitor General that that petition be withdrawn. But no condition is contained in that stipulation, Your Honor, of any condition placed on the Department of State or the Government of Israel as to what happens when he gets back to Israel.

So we would submit that it is a fundamental fairness owed—I beg your pardon, Your Honor.

Again, the plaintiff came in after this assessment and asked to have his extradition held off. And the Department of State took it up with the Government of Israel, and they were very upset and reluctantly agreed to let him stay here one more week.

39 The Government of Israel said, "No more extensions" as far as they are concerned.

Now, what we are talking about here is an enjoining action under a treaty agreement with another country—basically what we are talking about here.

There is a signed warrant for this man's arrest and to be extradited to Israel. What the Department of State has done is through.

So we would submit that what this Court would do by entering some type of injunctive relief would be to interfere with a treaty agreement which says that the United States under certain terms and conditions, which have been fulfilled here, in its agreement with a foreign country will extradite this individual.

So that is what they want this Court to interfere with and hold up.

Now, we would, after further argument, Your Honor, without getting into the merits of the thing, if this Court would like jurisdiction to enter an injunction to enjoin the U.S. Marshal in New York from executing its warrant and taking him to the Israeli officials who will escort him back to Israel—if the Court would indulge me . . .

I am not thoroughly familiar with this case, Your Honor. It was given to me just before coming into Court: It's the case of Smith versus Katzenbach, and it's found at 351 Fed.

40 Second 810, 122 U.S. Ap D.C. 113. And it's a 1965 case written by Judge Leventhal—the opinion.

And in that case, it involves an Internal Revenue Service problem with an individual in North Carolina. And the plaintiff sought relief in this jurisdiction and asked this Court to restrain the Marshal or Government officials in North Carolina from taking certain actions or doing certain things which were related to this plaintiff.

And Judge Leventhal said: "This is not the appropriate jurisdiction," because the District Court there where the action is going on had the authority and should be the appropriate Court to take whatever action against these Government officials that might be deemed appropriate.

"And this Court does not have the equity jurisdiction to do that."

This is, essentially, what the plaintiffs are asking this Court to do, to exercise its equity jurisdiction to restrain the U.S. Marshals in the Southern District of New York.

And we submit that the Court lacks jurisdiction.

The COURT. What about Title 28, 1361?

Mr. RANKIN. Your Honor, we would submit that that is a remedy statute. It's the issuance of mandamus . . .

The COURT. That's in accordance to what the Court of Appeals has advised the trial Courts of this Circuit.

Mr. RANKIN. That will get you in the courthouse

41 door?

The COURT. Yes, sir.

Mr. RANKIN. Well, I've never heard . . .

The COURT. Do you want to read it?

Mr. RANKIN. Yes, I would like to.

The COURT. All right.

Mr. RANKIN. Not right now. I would like to go forward a little bit more.

The COURT. All right.

Mr. RANKIN. Even if they get in the courthouse door, they have a few other things to satisfy.

The COURT. Oh, I realize that.

Mr. RANKIN. And we would submit, Your Honor—I think I've covered the public policy situation that plaintiffs have to show to get temporary injunctive relief, that it's in the public interest to grant this relief; and we suggest to the Court that it's not irreparable injury. We would question the irreparable injury involved here.

As this Court knows, we have litigated with numerous criminals, thousands of miles away, through attorneys here or by

themselves. And it seems that these criminals have been entitled to their rights.

And we submit that plaintiff here has a very capable attorney, and he will be able to conduct whatever judicial proceedings might ensue, Your Honor, regarding the tax
42 situation.

I just can't see the irreparable injury involved when, in fact, what we have here is someone who is in this country illegally, who is pursuant now to treaty obligation and to an obligation of this country to extradite him pursuant to these procedures.

He is now seeking a delay when the Government, another arm of the Government on a completely different thing, a tax assessment, realizing that this man is going to leave and the assets will be gone, makes an assessment against him and, according to law, is entitled to do that.

We suggest that there is no irreparable injury here, Your Honor, sufficient for a temporary restraining order.

Basically, those are my observations at the present time. I don't know whether these gentlemen have any further things to say on behalf of the Government now.

Oh—I did cover the issue, I think, about the verified complaint where we take issue with some of the verified allegations in that complaint, Your Honor, concerning the content of this alleged agreement.

[The Court confers with the deputy clerk.]

The COURT. All right.

Mr. RANKIN. If the Court please, just briefly, I would like to state one more fact that I left out.

Your Honor, the warrant for the arrest is now in the hands of the Israeli Government in New York. It's not in the
43 hands of the U.S. Marshal.

The U.S. Marshal makes an arrest purely out of comity with Israel. Israel could walk out now and arrest this gentleman on the basis of the warrant that they have in hand.

The COURT. I see.

Mr. RANKIN. Very well.

The COURT. All right.

Mr. Lewin?

Mr. LEWIN. Yes, sir, Your Honor.

Just on this last proposition, it amazes me. I, in representing Mr. Shapiro in this extradition matter, read through the stat-

utes in 18 U.S.C.; and the notion that the Secretary of State's warrants can simply be executed by a foreign Government on American soil, I don't think finds any precedence in the cases or in the statute. It's got to be executed by United States officials pursuant to the language in that warrant, pursuant to ordinary procedures.

And it's really for that reason that we are in this Court, Your Honor.

I think that Mr. Rankin . . .

The COURT. Why aren't you in the Southern District?

Mr. LEWIN. We are not in the Southern District. There were negotiations that were conducted here with the Department of State.

There were discussions—I am located here—there
44 were discussions that were conducted here about the terms of Mr. Shapiro's release. We are not attacking his extradition.

I mean, I think that one thing that should be made clear is that Mr. Shapiro was perfectly prepared—his state of mind was such that he was returning to Israel on December 9th. And all of the arrangements were being made for his return to Israel on December 9th.

And I think that the critical factor is that during that entire period of time, a full year, I think, or a good number of months prior to his return, nobody whispered to him or to me in any way that there was any question about his taxes.

Now, I flew up to New York this Monday. I heard about these levies on Thursday. I called Mr. Stein. I called the Department of State.

We finally managed very late on Thursday—it may even have been on Friday—or else it was late on Thursday—to get a delay of a week in the extradition.

I flew up to New York, and I talked to the agent in New York. I insisted on meeting with him immediately to find out what the basis of this was.

And the fact of the matter was, it was one of the most uninformative meetings I have ever been. The three men sat across the table and they told me, "Well, this man has lived here for three years and he has gotten married and he has bought a house."

45 And he reported. He filed a tax return in '71. He filed a tax return in '72. Mainly, what he was doing in the

United States was trading in commodities. And he lost money during those years, and he has records to back that up.

They said, "Well, how could he have lived if he lost money?"

It was just pure rank speculation on their part.

They refused to give me the slightest iota of any basis for this kind of assessment.

I can only speculate, but certainly my speculation is that it is not beyond the realm of possibility that they just said, "Well, now, look: This man has lived here for a number of years, and, therefore, we're going to freeze whatever assets he's got here simply in case we ever turn anything up in a tax audit.

He was never asked about a tax audit.

They said to me on Monday: "Are you ready to produce his books and records?"

I said, "Well, I think, from the short discussion I had with him, we are perfectly prepared to produce everything. All we need is the time to get it together and to talk about it, and then, if there are any questions about it, he can explain it."

Now, that's the ordinary, Your Honor, and that would have been the procedure that would have been followed if I.R.S. had very politely either called me or called Mr. Shapiro
46 in July, in August, in September, in October, in November, anytime, and said, "Look, we're checking this man's taxes. Could you please bring down his books and records."

It's really absurd for the gentelman from the United States to be saying that even though no irreparable injury or that Mr. Shapiro has adequate representation, he can go into a Tax Court.

He can't go into a Tax Court.

I told him to get together his books and records. In 1971, he was not yet married—he was a bachelor—I am thinking back to my own bachelor days—he has records that were kept irregularly.

He has gone back to his bank and asked them to make up the bank statements for him. They told him it takes two to four weeks to get all back statements and get the microfilm to check.

There are matters that can be discussed with the Internal Revenue Service. The records can be opened to them. And whatever tax questions that there are can be established.

The man had investments in Europe—I think that is reflected in an affidavit before Your Honor—which were successful before he came to the United States and he has lived off those investments.

And I might say he lost money in the United States. He probably would have done better to have stayed in
47 Switzerland and invested his money there rather than coming to the United States and attempting to trade in commodities.

But, in any event, to say to this man—for the United States to say to this man with one hand, "We are seizing $92,000.00 on the sheerest of speculation without giving you a single word or whisper of what basis that's being made on"; and with the other hand saying, "We are shoving you out the door and into a jail in Israel"—it seems to me then to be just outrageous.

It's just the rankest denial of due process with regard—forget about his extradition for a minute—with regard to the seizure of that $92,000.00

Is Mr. Fuerth seriously telling me that on February 6th, when Mr. Shapiro is sitting in a jail in Israel and I'm supposed to be marching into a Tax Court and filing a petition, which is supposed to have some detail of explaining or arguing that he owes no taxes, I would have no opportunity to consult with my client about particular records, about particular items, that the Internal Revenue Service will or will not have.

There is absolutely no opportunity for me to do that. I can't file a petition with the Tax Court in those circumstances.

And I think that's what distinguishes this case so clearly from Enoch and from all the cases that follow that line.

Mr. Fuerth is absolutely right. Enoch sets down a conjunctive standard. It says you have to meet two criteria.
48 But the standards of Enoch, what Enoch is talking about, is a jeopardy assessment that meets the constitutional standard; and that is where Mr. Fuerth is all wrong.

This jeopardy assessment doesn't meet the constitutional standard because it doesn't meet what Justice Brandeis said: "There are minimum constitutional standards," in Phillips versus Commissioner in 1931, which is that there be merely a postponement of the judicial inquiry; that there be an opportunity later on to litigate that matter.

If Mr. Shapiro were in the United States and if he were entitled to remain in the United States until the tax issue is resolved, we could have no dispute with the jeopardy assessment

standard. Enoch would be clearly right because in that case we would have to wait until we get our day in court in the Tax Court.

But where the United States on the one hand is saying to him, "Now, unless you file with the Tax Court within 90 days of the date we give you this notice," and then with the other hand, saying, "We'll shove you out the door and you can not be in the United States and you are in jail in Israel," then they are denying him the right, as Justice Brandeis, Your Honor, said, is the very premise of the whole jeopardy assessment procedure.

So another exception to Enoch, which is an exception that I think the Court recognized in that opinion, is that
49 there may be instances where the judicial inquiry is totally foreclosed. And if that's true, you don't have to meet those two standards because that's just an unconstitutional jeopardy assessment.

That brings me to the question of the complaint, Mr. Shapiro verified it; I verified it because there were terms regarding that agreement that I entered into. I had discussions with the Department of State.

But I don't rely merely on the allegation. I direct Your Honor's attention to Exhibit 1 of the complaint. That's a letter from the Department of State to me dated September 19, 1973.

And the opening paragraph in it states that "In a meeting in Mr. Mark Feldman's office"—he's the deputy legal advisor—"you,"—that's me—"indicated that your client, Samuel Shapiro, would drop all litigation in connection with his pending extradition and surrender to Israeli authorities if he could be given certain assurances."

Now, Mr. Rankin has made it appear that the Department of State was acting in a gratuitous, voluntary assistance to me and Mr. Shapiro in doing us a favor.

We had a petition of Certiorari pending in the Supreme Court. And, although it was not reflected in the pleadings, I will tell Your Honor that I told the Department of State that I had serious doubts as to whether the Department of
50 State internal procedures on extradition matters were sufficient—how they could withstand judicial challenge.

And I indicated to them that it was very likely that I might institute a proceeding in a court of law challenging the State Department's procedures.

They did not want that challenge. And there was an agreement pursuant to that and pursuant to my repetition of an offer that I made the very first day that I knew that I was representing Mr. Shapiro, when I indicated to the United States Attorney that this man wants to go back to Israel, is ready to go back and stand trial so long as he knows he won't languish in a jail in Israel, so long as he knows that he will be released on bail here.

The United States Attorney was not interested in picking that up. He just wanted to pursue the case and get the man extradited.

But when I raised that in the Department of State, they said, and I think quite properly, "That's a very reasonable request. Let's see if the Israelis will go along with it."

By that time, his wife was also pregnant; so the first condition came up as well.

As a result of those discussions, the diplomatic notes were exchanged.

But I call again Your Honor's attention to page 2 of that letter. And, again, this is not simply my allegation. It's
51 a letter from the Department of State when they were trying to get me promptly to drop that petition for Certiorari rather than write directly to the Attorney General of Israel, which I had done to make sure that the terms had been agreed upon by Israel.

And on that day the Department of State says to me: "I fail to see why it should be necessary to demand any greater assurances than you now have since you literally have a promise from the Government of Israel to the Government of the United States."

Then it goes on to say: "Your decision to write the Ministry of Justice," which I did, "is a delaying tactic"—which I deny—"embarrassing the Governments of Israel and the United States and not within the arrangement worked out between you and Israel or that between you and the Department of State."

In other words, they are recognizing that I worked out an arrangement with Israel and with the Department of State through the Department of State; but there was an arrangement, at least a tripartite, and I submit with the Department of Justice as well, a four-part arrangement.

The only answer I received from those two departments when I called them in great anger on December 6th, when I heard that my clent's assets had been frozen, was a statement of shock and surprise.

52 "I.R.S.? Well, how could I.R.S. go out and do this? We didn't know anything about it."

When I speak to I.R.S., I.R.S. says: "Well, they can't bind us. We're a separate agency."

That was the defense that I got from the Internal Revenue Service.

"We don't care what the Department of State has done and the Department of Justice. We're a separate agency and we didn't—we were not a party to any of the agreements, and we don't know anything at all about those terms."

But I submit to Your Honor that they are a part of the United States; that they can't with the one hand be saying to this man: "Because you're going to be extradited, you are going to forfeit $92,000.00."

And that is really what they said.

Now, our request to this Court is not—and we are not here challenging extradition and, as I say, Mr. Shapiro was perfectly willing, I dare say, eager, when I told him on December 6th or on December 7th: "Look, what's happened is that this has been postponed for a week." That isn't what he wanted. He was ready to go ahead and surrender and go over to Israel and defend himself.

And I told him all of this had been postponed for a week.

53 All that he wants is to be able to have those assets be able to be used for his release on bail in Israel. He is ready to go this Sunday if those assets are released and he is, therefore, able to be released on bail.

Now, Mr. Rankin says: "We were not a party of guaranteeing his release on bail in Israel."

Of course, the United States is not a party. I never asked the United States to guarantee his release on bail in Israel or to give him the funds.

All I wanted—and I think I am entitled to from the other party to a contract, a contract in good faith, is that they not affirmatively interefere to take my clients assets, which he is relying on to be released on bail.

Now, they knew that those assets were going to be used because I spoke with Mr. Stein on the telephone and I very specifically made reference to the fact that I needed a certification from the Marshal on December 9th, when Mr. Shapiro would be surrendered, so that we could properly get these funds released so he could be released on bail in Israel. They knew that that's what is was going to be used for.

They may not have communicated to the Internal Revenue Service. I don't think these gentlemen are acting in, you know, total bad faith. I don't accuse them of that.

I was with the Government for a long period of time myself, and I know it's a big government. And I know that one arm of the Government sometimes doesn't know what the other

54 one does.

But I think that when it learns what the other arm of Government does, then it's got a duty to make its actions consistent with what the other arm of Government has recommended.

The COURT. That may well be, but what about the Congress of the United States which enacts the Internal Revenue laws, as set forth in Title 26 of the United States Code, which spell out certain precedural remedies for setting aside an assessment such as was made here?

Mr. LEWIN. I think that's right, and I think that applies in 99 and 99/100 percent of the cases.

But there may be a situation, and I think this is it. And I think Mr. Fuerth admitted it in answer to Your Honor's question.

There may well be a situation where the application of that statute becomes unconstitutional as applied to a particular individual.

And we submit—I can't think of a more classic instance.

The one that Mr. Fuerth cited—I don't think met those standards. I think there ultimately was, as he said, a tribunal in that respect that reviewed it.

But I think here for the United States or for Congress assuming Congress passed a statute and said, "In regard to all extraditees, we immediately seize all their assets and there is

55 no remedy at all"—Congress could pass that statute; this Court, I am sure, would strike it down.

And I think that is really what the Internal Revenue Service has done in this case and in a practical way: They said with regard to this man's being extradited, two days—two days, Your Honor, not three months, when a counsel would come in

to them, could open the books, and could say, "Well, now, look, there is not liability here; and here are the assets that the man brought from Europe."

But two days before he leaves, they say, "All right, Now we are going to freeze all of that money."

Now, I think Your Honor's suggestion is what seems to me to be a remedy, certainly, which is that if the extradition is delayed until such time as the Internal Revenue Service files its notice and there is litigation on that, that's one remedy.

Another remedy is simply to lift those jeopardy assessments, which I submit the Court has the power to do because they are unconstitutional as applied to this set of circumstances.

The COURT. Well, how about this Court's jurisdiction to do that?

Mr. LEWIN. I think this Court does have jurisdiction. It has jurisdiction . . .

The COURT. Under what statute?

56 Mr. LEWIN. It has it under—you mean this Court as opposed to the one in the Southern District of New York?

I think generally the case should come in . . .

The COURT. Why does this Court have jurisdiction?

Mr. LEWIN. This Court has jurisdiction because it is a suit against Government officials, as Your Honor said, under the mandamus statute, under 1361.

I think the Court has jurisdiction because it is an action under the Constitution and laws of the United States in which—by combination—maybe I didn't finish my point when I first stood up.

I am bringing this action here because it's a combination of the actions by the Secretary of State, the Department of State, the Department of Justice, and the Internal Revenue Service that deprives this man of his constitutional rights.

My main grievance is with the Internal Revenue Service because of what they have done. I think we have resolved matters with the Department of Justice and the Department of State.

But if the Departments of Justice and State insist on proceeding in light of the Internal Revenue Service's action, we submit that they should be enjoined or the Internal Revenue Service should be enjoined.

But I had to join all of these parties here, and that's why I brought the action. And I think this is the proper

57 forum.

This isn't a case—I haven't read the one in 351 Fed. Second that Mr. Rankin—but that sounds to me from what he said that that was a case that involved only North Carolina . . .

The COURT. Well, we are going to go look at it.

Mr. LEWIN. Nothing was done in the District of Columbia here.

There were letters. There were negotiations.

I must admit, Your Honor, as a very practical circumstance, the amount of time that I have had since this thunderbolt last Thursday—I flew up to New York to discuss with the Internal Revenue Service; I drafted that letter; I spoke with these people. It would be an extreme hardship for me to file this suit up in the Southern District of New York and fly up there with all the papers.

I am here. My client retained a Washington counsel on this. And in all honesty, I think if there is to be any hearing in this as to what the terms of the agreement were, I think the Department of State is here and the Department of Justice is here, the real parties to that agreement are here.

The COURT. Would you have any objection to the Court's transferring this to the Southern District of New York?

Mr. LEWIN. Well, I would have objection, Your Honor, unless Your Honor were to grant a temporary restraining order for a ten-day period, let's say, and then have a hearing in

58 the Southern District of New York.

I think, really, the witnesses are here. I think for the convenience of the parties it's better here; and, as I say, my main point is we're in court today.

This man attempted to surrender under the extradition warrant on a date set for extradition. He is not interested in defying any law.

If Sunday is the date set for extradition, I just don't see practically—here it is Thursday afternoon at almost 4:00 o'clock—I've come into court and had to explain all of this in my papers as quickly as possible. I don't know what remedy or how soon I could get any remedy.

The COURT. All right. Thank you very much.

572-247 O - 75 - 5

The Court will retire to chambers and come back and announce its decision.

Mr. FUERTH. Your Honor, may I just make one suggestion?

The COURT. All right.

What is it, Mr. Fuerth?

Mr. FUERTH. One thing occurred to me, Your Honor. You asked me for a case which involved extradition matters, and I didn't think about it at the time.

The COURT. All right. Give it to my law clerk.

Mr. FUERTH. Okay.

[Thereupon, the Court recessed at 4:52 p.m.]

[Following the afore-mentioned recess, the Court reconvened at 5:15 p.m.]

59 The COURT. Let the Court take this opportunity to welcome its good friend Mr. Aikens and his associate, Mr. Zimmerman, with whom the Court has had a very pleasant and proper and interesting relationship for many years.

The Court has before it a complaint filed by one, Samuel Shapiro, and his wife, Bella Shapiro, of Monsey, New York, versus the Secretary of State, the Commissioner of Internal Revenue, and the Acting Attorney General of the United States.

This is an action brought under Sections 1331 and 1361 of Title 28 United States Code and arises under the Constitution and laws of the United States.

It is alleged also that the controversy exceeds the amount of $10,000.00.

It is also alleged that the jurisdiction of this Court is invoked under Section 1332 of Title 28.

Most of the facts in this case are undisputed as set forth in the verified complaint now before the Court; and, therefore, the Court will not waste counsel's time to review all of the facts in detail which have already been recounted not only by the Court but by counsel in extensive argument.

To come back, however, the complaint alleges that the Commissioner of Internal Revenue and his agents have levied an assessment upon certain of plaintiffs' funds located in Chemical Bank of West Nyack, New York; the Nanuet National Bank of Monsey, New York; the Times Savings Bank at Forty-eighth Street in New York; and Fred Topper of 85 Baxter

60 Street, New York, New York; and any other places where such notices of levy have been served respecting plaintiffs' funds.

The complaint seeks to have the action of the I.R.S. set aside and seeks today to have the Court enter a temporary restraining order, which would restrain the Department of Justice and its agent, the United States Marshal for the Southern District of New York, Mr. Thomas E. Ferrandina, to refrain from executing a warrant of extradition for the plaintiff issued by the Secretary of State until the issuance by the Internal Revenue Commissioner of its notice of deficiency as required by 26 U.S.C. 6861, until such time as plaintiffs have had an opportunity to contest the legality of the jeopardy assessment made under Section 6851 of Title 26.

The Government, through Mr. Stein, has made a rather persuasive argument here, that the Government of the United States depends for its very existence in large measure upon the collection of income and other taxes. And the Congress of the United States has indicated support for that proposition by enacting what is generally known as an anti-injunction statute.

And the same general principle has been recognized by the Supreme Court of the United States in the case of Enoch versus Williams Packing Company. That case was decided in 1962 and is cited and found at 370 U.S., page 1.

And therein the Court held that it did have jurisdic-

61 tion to enter an injunction to prevent the defendant in that case from denying the plaintiff its tax-exempt status for as long as its operations did not conflict with its amended exempt application.

Now, the anti-injunction statute which the Court alluded to earlier does not bar the equitable relief here and neither does the Williams Packing Company case just referred to.

And after listening to the facts as outlined by counsel and reading them in the verified complaint in the case at bar and referring to the case of Smith versus Katzenbach, a decision of the Court of Appeals in this Circuit and cited at 351 Fed. Second 810, in 1965, by a panel consisting of Judges Fahy, Burger, and Leventhal, Judge Leventhal writing for the Court—there Judge Leventhal did suggest that want of equity jurisdiction while not jurisdictional in the sense of the power of the Court to decide the case, is a principle of such moment that it is properly raised even on the foregoing motion and has particular importance when the Court is being asked, in effect, to take action in anticipation of a criminal proceeding in another forum.

However, Judge Leventhal, in writing for the Court in the Smith case, which this Court is now referring, mentions that "The federal judicial system contemplates supervision by the Federal District Courts of the nation over the Government attorneys and enforcement officers acting within their
62 District, a supervisory jurisdiction possessed, in turn, on review by the Federal Courts of Appeal and ultimately by the Supreme Court of the United States."

Now, Judge Leventhal also said this, and I quote again: "To gain the perspective needful for this case, we express our canvass beyond the traditional rubric of adequacy of remedy at law.

"A Court properly exercises its discretionary powers by withholding relief that may involve the injection into criminal proceedings in another forum, particularly where it adheres to a policy indicated by Congress."

And further quoting, again, Judge Leventhal said: "Factors of public interest involved in the optimum distribution of Court burdens with appropriate concern for localities of origin and impact of litigated controversies are properly taken into account in the exercise of judicial discretion."

And most importantly in the eyes of this Court, Judge Leventhal also said the following, which the Court quotes again: "Such broad considerations of public interest are appropriately considered by Courts, in going further, both to give and withhold equitable relief than is customary only when private interests are involved."

Now, it seems to this Court at least in the brief time available to it to examine the authorities, that there is a serious question of the denial of procedural due process that
63 may have resulted and may well, in fact, result to the plaintiff in the case at bar unless and until he has an opportunity to personally appear to participate and assist his counsel in the litigation of the fact disputes arising out of the action set forth in the complaint by the Commissioner of Internal Revenue and his agents, servants, and employees.

From the facts in this case, it does not appear to this Court at least that the plaintiff can fully and adequately litigate the question of the legality of the assessment by long distance while in jail in Israel.

The facts in this case indicate to the Court that this is a very extraordinary, unusual circumstance, one that Courts are not often called upon to deal with.

To deny these plaintiffs the equitable relief that they, in effect, seek would be to leave them at the mercy of an all-powerful Government without an adequate remedy at law.

It further appears that granting of the injunctive relief in this case and the temporary restraining order in no way would burden the Government and will provide only for an opportunity to have the determination to take these monies belonging to the plaintiffs, or either of them, litigated in accordance with the requirements of procedural due process.

Therefore, this Court finds that the petitioner or plaintiffs in the instant case would be irreparably injured unless the Court issues the temporary restraining order.

64 Secondly, the Court finds that the issuance of the temporary restraining order would not substantially harm other interested parties—and that is to say either the Government of the United States would not be harmed and neither would the State of Israel.

It is also axiomatic that the public interest would be served in this case for the Court to issue a temporary restraining order so that it, as well as counsel, would have a better opportunity to resolve the issue of the propriety of the issuance of this injunction and also the propriety of the issuance of the levies or the tax assessments or the assessments, whatever they may be called, against the funds owned by the plaintiffs and each of them or either of them.

Accordingly, and for all of the reasons given by the Court, particularly the appearance that there has been a denial of the procedural due process here and that this case presents a factual situation which comes within the exception of the Enoch case and that the Enoch case is not a bar to the result announced by the Court.

The Court will sign a temporary restraining order.

The COURT. Madam clerk, set the matter down for an early hearing as soon as possible.

Counsel for the plaintiff will present an appropriate order in accordance with this brief opinion.

Mr. RANKIN. If the Court please, if we could address
65 a date for a preliminary injunction, the Government would appreciate if the Court could expedite that hearing at least within five days, if possible.

I don't know whether plaintiffs have filed a motion for a preliminary injunction, which should be in their papers.

The COURT. I believe I saw it in a motion for preliminary injunction.

I will be glad to accommodate you to that extent.

Mr. LEWIN. Yes, Your Honor.

The only thing, I do have another motion for a preliminary injunction on before Judge Gasch for Tuesday afternoon. But we will be ready to go for a preliminary injunction as soon as, I think, after Tuesday afternoon, if a date can be set.

The DEPUTY CLERK. Do you have a proposed order?

Mr. LEWIN. Well, we had a proposed order, Your Honor.

Might I get some clarification because we were unsure about the nature of the remedy.

Am I to understand that Your Honor is saying that there should be a delay of the extradition?

We had a proposed temporary restraining order in which we had two, sort of alternative, paragraphs; and I'm not sure that . . .

The COURT. All right.

Let me stop and look at this.

[The Court looks at the proposed order.]

66 The COURT. You will have to draw another order to make it conform to the opinion of the Court. You can discuss with the reporter what I said.

You will also have to provide for the posting of a sufficient bond and surety; and I will fix the bond at the amount of $1,000.00 surety or $100.00 in cash.

Mr. LEWIN. All right.

Yes, Your Honor.

But what I understand what Your Honor has essentially said is that . . .

The COURT. Everything will remain in the status quo until such time as the Court has an opportunity to hear the matter on the motion for a preliminary injunction.

Mr. LEWIN. So that there will be no extradition until that time?

The COURT. That's correct.

Mr. LEWIN. By Your Honor's permission, there is one more matter: In the course of the argument, I think counsel for the Government indicated that the warrant is now in the hands of the Israel Government.

Now, I don't know what their reaction to this action will be.

The COURT. You can put a provision in there that nothing will be done by the United States Marshal in the Southern District of New York or anybody acting under the jurisdic-
67 tion of the Director of the United States Marshal's Service to execute that warrant until such time that this Court has had an adequate opportunity to hear arguments both from the Government and from plaintiffs with respect thereto.

Mr. LEWIN. Or to take the plaintiff in physical custody because he stands . . .

The COURT. All right.

I will agree to that, too.

Mr. LEWIN. Thank you.

Mr. RANKIN. One question, Your Honor: If the order is drawn and granted certain relief regarding the levies that have been executed, we would request the right to come back in and argue further the issue of the bond.

Mr. LEWIN. Well, we're not . . .

Mr. RANKIN. Because we would suggest that $1,000.00 would be very insufficient if the order will release any of the money.

The COURT. No, I don't intend that the order will release any money.

Mr. RANKIN. Very well.

The COURT. Not at all. I didn't mean that. I don't think I said that in the record.

Mr. RANKIN. I don't think you did, Your Honor; but plaintiff is writing the order and I didn't know and I . . .

The COURT. Well, now, wait a minute.

68 Mr. RANKIN. . . . that's all.

The COURT. Mr. Lewin, I expect you to engage in the professional courtesy, show the order to Mr. Rankin so he can get in touch with his associates. I am not going to sign any order that you submit until they see it and they indicate that they have seen it in writing.

Mr. Zimmerman knows that, if anybody in the courtroom knows it.

Am I right, Mr. Zimmerman?

Mr. Zimmerman. Yes, Your Honor.

The COURT. All right.

Mr. LEWIN. I have no other intention, Your Honor, and I have acted that way with Mr. Zimmerman myself.

The COURT. He is not only a good adversary, but he is a good advocate.

The COURT. Thank you very much.

[Thereupon, the above-entitled matter was concluded at 5:32 p.m.]

[Jurat omitted in printing]

1 [Filed December 14, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

ORDER

Upon consideration of plaintiffs' Motion for a Temporary Restraining Order seeking to direct the lifting of Notices of Levy served by the agents of defendant Commissioner of Internal Revenue, (copies of which are attached to the pleadings in this case) or alternatively enjoining enforcement of the extradition warrant for plaintiff Samuel Shapiro, and a hearing on this motion having been held on December 13, 1973, and after consideration of the verified complaint, all the pleadings on file herein and arguments of counsel for the parties, and it appearing that unless the relief sought is granted irreparable injury to plaintiff will result in that plaintiff will be deprived of his liberty and his procedural due process rights to contest the legality of the seizure of his funds, and for the reasons stated more fully in the Court's opinion delivered orally at the conclusion of the hearing, it is, this 14th day of December, 1973.

Ordered that the defendants and all persons acting under their direction and supervision or in concert with them, are hereby restrained from executing any warrant for the extra-

2 diction of Samuel Shapiro, and from taking him into physical custody until further Order of this Court insofar as it may relate to any issue growing out of this action; and

It is further ordered that the plaintiff Samuel Shapiro, or counsel acting on his behalf, shall post a bond in the amount of $1,000 or cash in the amount of $100; and

It is further ordered that this order will expire at 5:00 p.m. December 19, 1973, and a hearing on a motion for a preliminary injunction will be held before this Court on December 19, 1973,

at 3:30 p.m. unless a different date is set by subsequent order of the Court; and

It is further ordered that insofar as the plaintiffs' application for Temporary Restraining Order seeks in any way to enjoin the Commissioner of Internal Revenue from making any assessments, filing any lien, or seizing any property so as to collect any tax assessments against the plaintiff Samuel Shapiro, such relief is denied without prejudice to the relief sought in the plaintiffs' Motion for a Preliminary Injunction.

CLEVELAND RIEBEY,
United States District Judge.

Dated: December 14, 1973, at 2:05 p.m.

Approved as to form:

MERLIN D. NUNLNER,
Counsel for Plaintiffs.

ROBERT S. RANKIN,
Counsel for Defendants.

A true copy.

JAMES F. DAVEY,
Clerk.

By Margaret L. Nopin,
Deputy Clerk.

[Filed December 17, 1973]

United States District Court for the District of Columbia

1 [Title omitted in printing]

PLAINTIFFS' INTERROGATORIES

To: Robert Rankin, Esquire, Assistant United States Attorney, United States Attorney's Office, District of Columbia, Washington, D.C.

The plaintiffs hereby request that the defendant Commissioner of Internal Revenue or an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. On what date did the Internal Revenue Service begin an investigation or inquiry of any kind regarding the income tax liability of Samuel Shapiro for 1970 or 1971?

2.(a) Was there any communication between officers or employees of the United States Department of Justice, including representatives of the Office of the United States Attorney for the Southern District of New York, with any agent of the Internal Revenue Service with regard to this matter?

2.(b) State the times, places and participants with regard to any such communication.

2.(c) State the contents of any such communication and whether done orally or in writing.

2 3. State the basis for the assessment in the amount of $6,843.68 for the income tax liability of Samuel Shapiro for 1970.

4. State the basis for the assessment of $85,876.73 for the income tax liability for Samuel Shapiro for 1971.

5.(a) State when agents of the Internal Revenue Service first learned that Samuel Shapiro would be extradited from the United States.

5.(b) State the name of the agent who received this information and from whom he received it.

5.(c) State the date which was communicated to the Internal Revenue Service as the date for the extradition for Samuel Shapiro.

6. State why no effort was made by the Internal Revenue Service to inquire from Mr. Shapiro directly regarding his financial records for 1970 and 1971 before the levying of the jeopardy assessment.

7. State what records, if any, of Samuel Shapiro would be relevant and material in establishing whether or not the assessments made on December 6, 1973, are valid.

8.(a) State the date on which the District Director of Internal Revenue approved the issuance of the jeopardy assessment made on December 6, 1973.

8.(b) State the names of the Internal Revenue Service officials who recommended and approved such jeopardy assessments.

3 9. State the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro.

Please take notice that a copy of the answers to the above interrogatories should be served upon the undersigned counsel.

Plaintiffs hereby request that defendants respond to these interrogatories prior to the hearing on plaintiffs' motion for a preliminary injunction set for Wednesday, December 19, 1973 at 3:30 P.M.

NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036,
Attorneys for Plaintiffs.

Dated: December 17, 1973.

1 [Filed December 17, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

REQUEST FOR PRODUCTION, INSPECTION AND COPYING

To: Robert Rankin, Esquire, Assistant United States Attorney, United States Attorney's Office, District of Columbia, Washington, D.C.

Plaintiffs in this case hereby request that defendant Commissioner of Internal Revenue or an officer or agent thereof produce and make available for inspection and copying by plaintiffs' counsel the following:

1. Any memoranda or other writings authorizing the institution of a jeopardy assessment against the plaintiff Samuel Shapiro for taxes due for the years 1970 and 1971.

2. Any memoranda or other writings among agents or officers of the defendant Commissioner of Internal Revenue or between such agents and officers and agents and officers of defendant Acting Attorney General and defedant Secretary of State regarding the extradition proceedings against plaintift Samuel Shapiro.

3. Any memoranda or other writings relating to the preparation and service of the Notices of Levy on the property and assets of plaintiffs, copies of which are attached to the Memorandum of Points and Authorities in support of plain-

2 tiffs Motion for a Temporary Restraining Order.

This request is made pursuant to Federal Rule of Civil Procedure 34.

Plaintiffs hereby request that defendant respond to this request for Production, Inspection and Copying prior to the hear-

ing on plaintiffs' Motion for a Preliminary Injunction set for Wednesday, December 19, 1973 at 3.30 P.M.

Respectfully submitted,

NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036,
Attorneys for Plaintiffs.

[Certificate of service omitted in printing]

[Filed December 18, 1973]

1 In the United States District Court for the District of Columbia

[Title omitted in printing]

WASHINGTON, D.C.

The above-entitled matter came on for hearing before the Honorable Charles R. Richey, United States District Judge, at 2:00 o'clock p.m.

APPEARANCES

For the plaintiffs: MARTIN D. MINSKER, Esq.

For the defendants: ROBERT RANKIN, Esq., and STEPHEN FUERTH, Esq., Assistant United States Attorneys.

TOM DOURIAN, 6808 U.S. Court House, Washington, D.C 20001, official reporter.

2 TRANSCRIPT OF PROCEEDINGS

The COURT. Good afternoon, gentlemen.

I have, through my clerk, told you to come in this afternoon. I want to be as brief as possible, so that we can make a record here and determine what is best and what the court should legally do.

Do I understand plaintiff has an application to make to the court to shorten the time within which to answer certain interrogatories? Is that correct?

Mr. MINSKER. Yes, Your Honor.

The COURT. And you also want to order the production of certain documents.

Mr. MINSKER. Does Your Honor wish me to proceed? I can be very brief.

The COURT. Yes.

Mr. MINSKER. As Your Honor will recall, this matter is set for hearing tomorrow at 3:30 p.m., on a preliminary injunction.

The COURT. Right.

Mr. MINSKER. The temporary restraining order is presently set to expire at 5:00 p.m. on that date at the government's request.

The COURT. That is correct.

Mr. MINSKER. Let me state first that yesterday afternoon at approximatly 3:30 or 4:00 p.m., copies of the interrogatories and requests for production were delivered by hand to defense counsel, to Mr. Rankin.

The information sought here is in four categories, essentially:

One, the reasons why the jeopardy assessment was put off until the very eve of the extradition;

Two, the extent and nature of communications running between and among the defendant Commissioner of Internal Revenue and the defendants Departments of State and Justice, respecting the arrangements executed by these departments and with the State of Israel regarding plaintiff's application to remain free on bail in Israel;

Third, the basis for the jeopardy assessment; and,

Four, the actual amount which the Commissioner of Internal Revenue intends to claim in the ultimate notice of deficiency, as opposed to in the jeopardy assessment.

Those matters are directly relevant to material allegations in our complaint.

I specifically referred the court to paragraphs 29 and 27 of the complaint, and paragraph 22. I will not read them since the court has asked me to be expeditious. However, set forth therein are allegations that the jeopardy assessment was deliberately delayed until the eve of extradition; that there was no legitimate or lawful reason for the delay of the jeopardy assessment; that these facts constitute gross bad faith on the part of the Commissioner of Internal Revenue, and other material allegations elsewhere in the complaint setting forth, in essence, a patent denial of procedural due process in the combination of governmental power in the jeopardy assessment and the extradition.

Ordinarily, plaintiffs have a period of 45 days—excuse me—defendants have a period of 45 days from the filing of the complaint within which to respond to the requested discovery.

Obviously, if the temporary restraining order expires and if the hearing on the preliminary injunction is going to be held in the interim, we need to have that information or that response available before then.

For those reasons, we have urged the court under Rules 33 and 34 to foreshorten the time for a response, and in the event that privileges are asserted, we will ask the court to rule on those privileges.

I will stop there for now.

The COURT. All right. Thank you very much. Mr. Rankin.

Mr. RANKIN. Good afternoon, Your Honor.

Your Honor, the point we would like to make is obviously the time factor involved in plaintiff's request here.

The COURT. I am glad you raised that. Let me ask you this, Mr. Rankin:

There is not any question but what the court has the power under Rule 33 to shorten the time or to lengthen the time which parties may be required to answer interrogatories and you know that specifically.

However, I am going to ask you very candidly:

Is there any way, physically, whereby you and your able associates who appeared here the other day could make this information available before tomorrow?

Mr. RANKIN. There is a possibility, Your Honor, that it would be physically possible to get some of the information.

The COURT. All right. Do you agree that it goes to the alleged denial of procedural due process?

Mr. RANKIN. I beg your pardon, Your Honor?

The COURT. Do you agree that the production of these documents, and the answers to these interrogatories, go to the alleged denial of his rights to procedural due process?

Mr. RANKIN. I don't think so, Your Honor.

The COURT. You do not think so?

Mr. RANKIN. Well, possibly in part.

The COURT. I do not want to cut you off, and I want you to make any arguments you want to make.

Mr. RANKIN. I appreciate that.

The COURT. All right.

Mr. RANKIN. I would also like to suggest to the court that I have not seen or discussed with these various people the answers to these things.

What we are talking about are people in New York and documents in New York. Had the plaintiffs filed this lawsuit in the Southern District, they might have been able to get quick information.

552-247 O - 75 - 4

We have been in a difficult position, as you know, Your Honor, in expediting this preliminary injunction motion, in trying to get some papers before the court to help inform the court of our legal position with regard to temporary injunctive relief.

Obviously, we have had an intervening weekend. We have had snow. We have had difficulties with secretarial help. These are personal problems.

The COURT. Now, wait a minute. I am not going to let something like that work an injustice on you.

Mr. RANKIN. I understand that.

The COURT. Or the other side. I do not think that is fair to the government or to the plaintiffs.

Let me ask you this, if you will pardon me again.

Mr. RANKIN. Yes, sir.

The COURT. Would you like a little more time, a few days' more time?

Mr. RANKIN. For what, to respond to a request for discovery?

7 The COURT. And to prepare your response to their request for a preliminary injunction.

If you do, I will be delighted to give it to you, because I don't want you to be penalized.

Mr. RANKIN. I understand that, Your Honor.

The COURT. And, frankly, I want all the help you can give me.

Mr. RANKIN. I agree, Your Honor. We were the ones who wanted seriously to expedite this thing as much as possible, and we are trying our best to get the record complete from our point of view and get a memorandum to the court.

There is no doubt we are having difficulty doing it. Hopefully, we will be able to.

The COURT. Now, Mr. Rankin, if you want more time, I will tell you right now: I am going to give it to you. All you have to do is just sneeze, and I will grant it.

Mr. RANKIN. I would like to be able to sneeze right now, Your Honor, but——

The COURT. I will tell you something. I am concerned about this case, and I do not want to make a mistake in this case, or any other, for that matter.

I think it has serious implications insofar as the potential rights of the plaintiffs are concerned, and also the Government of the United States.

Mr. RANKIN. I am in full agreement, Your Honor.

8 The COURT. I have a duty to be fair to both of you, and I have to rely upon the lawyers to present a good work product.

If time intervenes and prevents that, why, the likelihood is increased that the court might err, and I do not like that.

Mr. RANKIN. I am in full agreement with that, Your Honor. However, we are under a temporary restraining order which would have to be extended to allow for additional time.

We have considerations on the other side of a very sensitive nature in a case such as this, and it is just a very difficult position to be in, very frankly.

The COURT. All right, sir.

Mr. RANKIN. I would like to go forward with our position with regard to these discovery requests, but we may possibly have to seek further relief on this preliminary injunction situation later.

Hopefully, we will not.

The COURT. If you do, I will be available tomorrow. On the other hand, I wish you would address yourself to these motions, these pending requests, with respect to interrogatories and for the production of documents.

Mr. RANKIN. If I may address them in a general way, Your Honor——

9 The COURT. Surely.

Mr. RANKIN [continuing]: I think it is clearly oppressive under the rules for plaintiffs to come in at the ninth hour, the day before a hearing is set, and seek discovery of a broad nature, as they do here.

Now, these people have known—they filed their lawsuit last Thursday. If they wanted additional information, they could have served interrogatories and a request for the production of documents on us on Thursday or Friday. We argued the temporary restraining order on last Thursday.

That would have given us a couple more days to consider it.

We received it late yesterday afternoon, and you know what the help situation was around the Court House yesterday afternoon.

The COURT. I do.

Mr. RANKIN. Now, we have had our people here today trying to draft papers. We simply do not have time, Your Honor, to respond to the interrogatories in the time that they want us to.

Now, be that as it may, as we view the issues before the court, we are not talking about the issues of a possible tax suit which may occur in the Tax Court or possibly in the Southern District of New York.

10 We are talking about a claim by a plaintiff for temporary injunctive relief, whether or not this court should exercise equity jurisdiction to hold up an extradition that has already been litigated numerous times in the courts.

Superimposed on that is the basic jurisdictional issue as to whether this court has any jurisdiction over the case at all, setting temporary injunctive relief aside.

We submit, Your Honor, those are clear issues of law. The necessary facts to decide those legal issues are before the court, and we hope to be able to present that to the court in a memorandum without any need for additional discovery into the merits of the case, which we feel this court simply does not have jurisdiction to conduct.

Certainly, we would come in with a motion for a protective order, or certainly objections along this line, if this court were to shorten our period of time.

Clearly, we have not had the opportunity to prepare an opposition to a motion to compel. But, in any event, the court is aware of our time problem.

We simply suggest that what plaintiffs are doing here is seeking a preliminary injunction, which, we might add, Your Honor, there is simply no motion for a preliminary injunction before the court. We have not been served with a motion.

The COURT. I thought there was one in the file.

Mr. RANKIN. We brought that up at the temporary

11 restraining order hearing, Your Honor.

The COURT. I apologize to you.

Mr. MINSKER. No, Your Honor, we did not file a motion. Under the rules, as I understand them, our motion must be filed before the hearing. We are working under the same pressure, and we are trying to prepare the formal motion which is going to set forth, I believe, essentially the same relief requested in the motion for a temporary restraining order.

It will be joined with a supporting memorandum, Your Honor.

Now, I thought I had undertaken with Mr. Rankin to agree upon a time to exchange their papers and our papers before

the hearing, so that both sides would have an opportunity to review the written file.

We have not been served with their opposition papers, either, and I am undertaking to do that at any time the hearing is set.

The COURT. Well, the hearing is going to be set, or it has already been set, for tomorrow. It has already been set.

Mr. MINSKER. I understand that. I meant to say at any time the government is ready to serve their papers, and, even, indeed, I am willing to exchange drafts. We are still now preparing the memorandum in support of the formal motion for a preliminary injunction.

12 Our prayer for a preliminary injunction is set forth in a complaint. As I understand Rule 12——

The COURT. I understand.

Mr. MINSKER [continuing]. Rule 112 of this Court——

The COURT. I understand.

Mr. MINSKER. Thank you, Your Honor.

Mr. RANKIN. That is a rather novel suggestion on the part of counsel: that we have to submit an opposition to a motion that has not even been filed yet at the same time that he files a motion.

Moreover, Rule 6(d) states that a written motion shall be served not later than five days before the time set for the hearing.

We knew at the time last Thursday when the court entered a temporary restraining order that we would be prepared to come in, in five days.

Now, the question came up as to whether or not there was a motion before the court, and we received assurances that there was preliminary injunctive relief being sought. Clearly, it has to be by a written motion.

There is none before the court.

Mr. MINSKER. Your Honor, may I respond to that, or shall I respond after counsel concludes?

The COURT. Let the government finish its argument,

13 and then I will hear from you fully and completely.

Mr. MINSKER. All right, sir.

Mr. RANKIN. Now, in any event, it would appear, Your Honor, that the type of preliminary injunctive relief that plaintiffs seek would be an injunction from this court to en-

join the extradition of the plaintiff, to allow him time to contest the tax assessments, which could be, if in the Tax Court, approximately one to three years; or if it were on a refund case in the Southern District, it could be from one to five years, approximately.

That is what this lawsuit is all about: a preliminary injunction to allow him to litigate in another court, not this court, another legal matter.

The COURT. Why do I not transfer this right now to the Southern District of New York?

Mr. RANKIN. We suggested, Your Honor, last Thursday that that court was the proper court with the jurisdiction, and that this court under the Smith case should not retain jurisdiction.

The COURT. Well, I have been thinking about it, so you had better be prepared to argue that tomorrow, both sides.

Mr. RANKIN. In any event, Your Honor, we are trying to put papers together to come in before this court tomorrow with some type of record which will assist the court and address the issues, as we see them, even though there is no motion
14 before the court.

We think that some of the questions that plaintiffs ask in the interrogatories may be answered, and many may not be. Many of the documents may be irrelevant to our legal position. But, in any event, we suggest that this motion should be denied; that there will be plenty of time for plaintiffs, if this court ever gets to the merits of this claim eventually, to conduct the necessary discovery.

The COURT. All right.

Do you want to argue further?

Mr. MINSKER. Your Honor, first, I apologize for interrupting government counsel.

With regard to the nature of our request, the government says that this goes to the merits of the case, but the government has raised the Enochs test as a bar to our relief. Now, we submit the Enochs test does not bar relief, but one of the requirements of Enochs relates to the showing of no possibility of recovery.

More importantly, the thrust of our discovery is addressed to the reasons why the jeopardy assessment was delayed. So we submit that it is directly, materially relevant to the questions to be decided on the preliminary injunction.

The COURT. You do not deny that it is physically impossible for them to answer these interrogatories and produce these documents by tomorrow?

15 Mr. MINSKER. Your Honor, if there are no documents, or a limited number of documents, that would not be the case. Now, I know that at the time of the hearing on the temporary restraining order, government counsel for the Commissioner of Internal Revenue represented to the court that he checked with counsel in New York and was able to ascertain that that counsel in New York knew the fact that extradition proceedings were in progress and that he was scheduled to leave by December 9th.

It is possible to check by telephone and also to check the records here in Washington, which, we suspect, may be equally relevant, to ascertain whether there are any documents, Your Honor.

In other words, Your Honor, if the answer is "no" to all of these determinations, that can be put—that can be given to us very quickly.

Obviously, Your Honor, we are not asking the impossible to be done.

The COURT. Would you be satisfied with verbal answers?

Mr. MINSKER. Your Honor, we would be satisfied with representations in writing which can later be sworn and filed of record.

If all that can be done is verbal answers, I would be satisfied to write them down; I would type them up myself; and we could get the representations in sworn form at a later
16 date.

That would be one possibility.

Now, Your Honor, another possibility, of course, is the request for further time. If the government feels that it cannot supply this information in time——

The COURT. They will come in and tell me tomorrow.

Mr. MINSKER. That is right.

I think they can do that on that occasion. They have certainly said they can supply some of the information before then.

Now, with regard to the timing of our application here, Your Honor, we also have been working under extreme time pressures.

For example, we did not even know that there was a jeopardy assessment in force until three days prior to the agreed-upon time of removal. That was December 6th.

Since then we have been working as fast as possible to draft up the temporary restraining order papers and the complaint.

After that we had to work on Friday. I was here all day with respect to getting the order out and filed.

There was no deliberate delay in serving the papers until Monday.

The COURT. Nobody is suggesting that.

Mr. MINSKER. And we do submit that the record
17 shows that we acted as expeditiously as possible.

Furthermore, the government counsel characterized our requested discovery as of a broad nature. We submit that an examination of the discovery shows that it has deliberately been kept as narrow as possible because of the time constraints involved.

I will stop at this point unless the court has any other questions the court wishes to ask me.

The COURT. I do not.

I am going to deny the plaintiffs request for production of documents at this time until after the court has had an opportunity to examine the plaintiffs' motion for a preliminary injunction and to examine the government's response thereto.

However, since the interrogatories may be answered in part and may be relevant to the issue of extraordinary circumstances, and whether the government will ultimately prevail on the merits, the court will order, and sign an order, to this effect:

The government shall be required to answer such interrogatories before tomorrow, orally or in writing, as reasonable and diligent effort may provide.

I will leave it to the good faith of Robert Rankin, as a respected member of the bar of this court and the United States Attorney's Office, to do the best he can, and that is all he and his associates.

18 The COURT. I am not going to reduce the time out of hand and be heavy-handed with the government, nor am I going to be heavy-handed with the plaintiff.

I will say to the plaintiff that this is a very unusual case, and it is very important. But you have the threshold problem here of a sister court having entered an order of extradition to

the State of Israel for what that court has determined to be an extraditable offense.

Now, you heard the court's oral opinion delivered from the bench the other day dealing with the question of a possible denial of procedural due process and the fact that this court, at least tentatively, concluded that this did not come within the prohibitions of the Enochs case, and, therefore, it signed the TRO.

However, I would remind counsel for the plaintiff that you have a very heavy burden to show under the particular circumstances of this case, and it might be very well for both you and the government to consent to a transfer of this case to the Southern District of New York.

That court, it seems to the undersigned at least, might be in a much better position to understand the overall implications of this particular case, having had it before it on a previous occasion.

But you have chosen your forum, and if you want to stick to it, this court will do its best to do justice.

19 Mr. MINSKER. Does the court wish to hear us now on that point or tomorrow?

The COURT. Well, I assume I will hear you tomorrow, if you can file your application.

Mr. MINSKER. Yes, Your Honor.

The COURT. I told you both that I would give you an immediate hearing. If you do not come in and you do not serve your papers on them and they do not respond to it, you cannot expect the court to pull your problem out of its hip pocket.

I am not going to shoot from the hip on this. I will tell you that right now, and you had better submit a clear and persuasive and well-written memorandum so that I can examine it and come to the proper and appropriate answer.

I realize that you are laboring under a difficult handicap. I was in the same position myself as a member of the bar not too long ago. I hope I never forget it, and I will never forget it.

The court will be in recess until 9:30 tomorrow morning.

Do you want to say anything else, Mr. Rankin?

Mr. RANKIN. Your Honor, Mr. Fuerth from the Department of Justice was ready to address the issue of the possible transfer of this matter, if the court would like to hear the government's position at this time.

20 The COURT. All right. Mr. Fuerth, the court is going to hear you.

Mr. FUERTH. Your Honor, I am not trying to force myself on the court. I merely am trying to indicate that I have done some research on the matter preliminarily, and I am willing to give the court the benefit of my thinking on the matter.

The COURT. All right.

Mr. FUERTH. Your Honor, essentially, my thinking is this:

That insofar as this particular suit seeks to attack the assessment, it, in effect, is in the form of a refund suit, really.

And the jurisdiction for a refund suit lies in the district where the taxpayer has his residence, which I think everyone here would agree would be New York.

So under no circumstances could a tax refund suit be brought in any other district, other than New York, or in the U.S. Court of Claims.

Of course, now in this case, to the extent that the tax was not paid, it would be our position there would be no jurisdiction.

What I am saying, Your Honor——

The COURT. Let me ask you this. This is one of the questions they want answered by virtue of their interrogatories.

21 Mr. FUERTH. Yes.

The COURT. Do you feel that your jeopardy assessment covers the full amount of any possible liability, whatever is involved?

Mr. FUERTH. It is a full-year assessment, yes, Your Honor.

The COURT. So it would cover the bond of $55,000 that is already deposited, or was deposited, as I understand it, and is still on deposit, and covered by the jeopardy assessment.

Is that amount sufficient to cover the amount of tax due?

Mr. FUERTH. It would be for one year, not for both years.

In other words, let me explain something, Your Honor. The $55,000 is the amount of the bond. The collateral which we have levied upon is only $35,000.

In other words, there is a total bond of $55,000 which was put up. There was collateral in a number of different bank accounts.

The COURT. Yes, I remember that.

Mr. FUERTH. That is in the total amount of $35,000, in round figures. There are some dollars and cents there. And that we have levied on.

Now, this would more than cover the year 1970, I
22 believe in the neighborhood of $7000 or $8000. It would not cover the year 1971, which is almost $80,000, a little over $80,000.

The COURT. $80,000?

Mr. FUERTH. Yes.

The COURT. Of money earned in the United States of America?

Mr. FUERTH. This is unreported income, yes.

The COURT. In the United States of America?

Mr. FUERTH. In the United States of America, yes, sir.

The COURT. All right.

Mr. FUERTH. Our position is simply, as to the first amount, as long as Mr. Shapiro remains within the United States, and as long as this money is paid over to us—I might add it has not been paid over to us at this point; it is merely under seizure—the proper jurisdiction for a refund suit would be in the Southern District of New York.

The COURT. Give my law clerk the citations to the Code and any cases that you have on that.

Thank you.

Mr. FUERTH. Thank you, Your Honor, for the opportunity to be heard.

The COURT. Do you have anything you want to submit?

Mr. MINSKER. Your Honor, we are prepared to re-
23 spond to these arguments tomorrow, if the court prefers.

Suffice it to say for the record, we do not consider this a suit for a refund, but, indeed, a suit only to preserve the opportunity for procedural due process in utilizing the provisions of the Code.

I know the court wishes to conclude. We will respond at length to these arguments tomorrow.

The COURT. I would assume you anticipate this argument.

Mr. MINSKER. Yes, Your Honor.

The COURT. It is a pretty fundamental, threshhold question that the court is going to have to deal with.

Mr. MINSKER. I simply do not want to permit the characterization of the suit to go unrseponded to.

The COURT. I know you are under pressure. Yes, Mr. Rankin.

Mr. RANKIN. Your Honor, if I might just clarify your order with regard to interrogatories, as I understand it, the court

wants us to make every effort to respond to all of the interrogatories by tomorrow.

The COURT. If you reasonably can. You do not have to put it in writing. You can give it to them orally.

Mr. RANKIN. I presume we also reserve our right, Your Honor, to object; that you have not ruled that we have to respond to each one.

24 The COURT. That is correct.

Mr. RANKIN. Very well.

[Whereupon, at this point the court adjourned.]

[Jurat omitted in printing]

1 [Filed December 19, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, pursuant to Rule 65 of the Federal Rules of Civil Procedure and upon the complaint, pleadings, memoranda, affidavits and Exhibits filed in support of this motion, and the hearings held herein, hereby move the Court for a preliminary injunction and as grounds therefor state as follows:

(1) On December 14, 1973, this Court entered an order which, *inter alia,* restrains the extradition of plaintiff Samuel Shapiro, and denied without prejudice to the relief sought in plaintiffs' Motion for a Preliminary Injunction the prayer for an order enjoining the jeopardy assessment in this case. Said order set a hearing on the preliminary injunction for December 19, 1973 at 3:30 p.m. Said order expires at 5:00 p.m. on December 19, 1973.

(2) Pursuant to arrangements concluded with the Department of State, the Department of Justice, and the State of Israel, plaintiff Samuel Shapiro agreed to waive further

2 rights to litigate in the United States Supreme Court and the State Department his extradition to the State of Israel in return for the agreement of the State of Israel that upon the posting of a bond in the amount of 250,000 pounds plaintiff would be permitted to remain at liberty during the course of his trial there. All parties to this arrangement knew that plaintiff intended and needed to utilize funds presently posted as security in the United States for plaintiff's appearance in the extradition proceedings in the United States as partial security for the bond demanded by the State of Israel.

(3) Pursuant to these arrangements, plaintiff agreed voluntarily to surrender himself for removal to the State of Israel on Sunday, December 9, 1973.

(4) The agents of the Internal Revenue Service knew of the pendency of the extradition proceedings and of the intention of the State of Israel to seek plaintiff's removal and of plaintiff's scheduled removal on December 9, 1973. These agents were in contact with agents of the Department of Justice conducting the extradition proceedings on behalf of the United States. These agents knew, or with an exercise of due diligence could have known, of all the arrangements set forth
3 hereinabove and in the complaint in this action.

(5) Nonetheless, without any lawful reason, these agents deliberately delayed the commencement of proceedings against plaintiff until three days before his scheduled removal from the jurisdiction of the United States, and then, sometime in the afternoon of December 6, 1973, without prior notice or warning of any kind to plaintiff or counsel, served Notices of Levy on banks and individuals holding the funds contemplated by plaintiff, the Departmet of State, the Department of Justice and the State of Israel to be utilized as bond pursuant to the arrangements concluded with these branches of the United States Government. The Notices of Levy were purportedly served pursuant to the jeopardy assessment procedures set forth at 26 U.S.C. § 6861.

(6) If the extradition of plaintiff is permitted to go forward while the Notices of Levy remain in force, plaintiff will be deprived of his right to contest the legality of the Government's seizure of his property, his right to liberty on bail during his trial in Israel as expressly and impliedly represented by the Government of the United States and his right to litigate further the legality of his extradition, all in violation of his rights under 26 U.S.C. §§ 6213(a), 6861, the Due Process Clause of the Fifth Amendment and the right to the assistance of counsel in defending against tax assessments, as more fully set forth in the pleadings filed herewith.

4 Wherefore, plaintiffs move this Court to enter an order:

(1) Directing defendant Commissioner of Internal Revenue, the agents, employees, officers, and representatives of the Internal Revenue Service, and all persons acting in concert with them or under their supervision, to take all action necessary to lift the Notices of Levy presently in force on plaintiff's funds and located at the following places: Chemical Bank, Route 59, West Nyack, New York 10960; Nanuet National Bank, Route 59, Monsey, New York; The Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York; Fred Topper, 85 Baxter Street, New York, New York; and any other places where such Notices of Levy have been served respecting plaintiffs' funds; or alternatively

(2) Enjoining all defendants, their officers, agents, representatives and all persons under their supervision and acting in concert with them from executing any warrant for the extradition of Sameul Shapiro and from taking him into physical custody as it may relate to any issue growing out of this action until such time as plaintiff Sameul Shapiro shall have had opportunity to contest the tax assessment made against him on December 6, 1973, as provided in the Internal Revenue Code and other applicable provisions of the laws of the United States;

5 (3) Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

HERBERT J. MILLER, JR.,
NATHAN LEWIN,
MARTIN D. MINSKER,
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036 (202) 293-6400,
Attorneys for Plaintiffs.

[Filed December 19, 1973]

United States District Court for the District of Columbia

MOTION TO DISMISS

Defendants, by their undersigned attorneys, respectfully move the Court to dismiss this action for failure of the plaintiffs to state a claim upon which relief may be granted and for lack of jurisdiction over the parties or the subject matter of this action in that (a) the Court lacks jurisdiction and competence to enjoin the execution of an extradition warrant, (b) the Court lacks jurisdiction over the United States Marshal for the Southern District of New York, (c) the Court lacks jurisdiction to hear unconsented suits against the United States, (d) the Court in this case lacks jurisdiction to grant injunctive relief relating to Internal Revenue Service jeopardy assessments, and (e) the Court lacks jurisdiction at this time to determine whether plaintiffs' will be denied due process in subsequent tax litigation.

In support of this motion and incorporated herein by attachment as Government Exhibits 1–9 are certified copies of documents relating to this action and as Government Exhibits 10 and 11 are two affidavits of Thomas J. Tallerico.

HAROLD H. TITUS, JR.,
United States Attorney.
ARNOLD T. AIKENS,
Assistant United States Attorney.
ROBERT S. RANKIN, JR.,
Assistant United States Attorney.

[Filed December 19, 1973]

In the United States District Court for the District of Columbia

[Title omitted in printing]

WASHINGTON, D.C.

The above-entitled matter came on for hearing before the Honorable Charles R. Richey, United States District Judge, at three o'clock p.m.

APPEARANCES

[The same as heretofore noted.]

TOM DOURIAN, 6808 U.S. Court House, Washington, D.C. 20001, official reporter.

TRANSCRIPT OF PROCEEDINGS

The COURT. All right, gentlemen. May we proceed.

Mr. LEWIN. Good afternoon, Your Honor.

Might I just begin by calling attention to a housekeeping matter. I notice that the time is 4:15, and I believe under Your Honor's temporary restraining order, which you signed, there was some provision in there that it was to expire.

The COURT. At 5:00 o'clock.

Mr. LEWIN [continuing]. At 5:00 o clock. Since it is possible, I suppose, that this hearing may run beyond that time, can we assume, with the understanding of the government, that that would expire on Your Honor's action on the present pending motion?

I just raise that, because I just do not want the time to lapse without——

The COURT. That is something you should take up with the other side. You will have to take that up with them.

Mr. LEWIN. All right. Might I just ask Your Honor simply——

The COURT. Because I do not know what the court is going to do until I hear your arguments.

572-247 O - 75 - 7

Mr. LEWIN. I appreciate that, Your Honor.

Might I just say, as another preliminary housekeeping matter, that because of, I suppose, the expedited schedule
3 in this case, I received a copy of the government's papers just before 3:30 this afternoon, which includes an extensive discussion of legal points, which I will refer to in my argument.

But I just wanted that matter simply placed on the record at the present time, because we may wish to respond to both the factual allegations and the legal assertions made in there.

The COURT. All right. How much time do you need, sir?

Mr. LEWIN. Do you mean in terms of a written brief or just argument?

The COURT. No. How much time do you need this afternoon?

Mr. LEWIN. I think right now, just in terms of argument, I would need 15 or 20 minutes.

The COURT. All right. I will give you 15 minutes, sir.

Mr. LEWIN. Thank you.

This case concerns, as I believe Your Honor is aware, the question of the validity, the constitutional validity, of a jeopardy assessment made upon an individual residing in the United States, married to an American citizen, one working day before he was scheduled to surrender pursuant to an extradition warrant under a voluntary agreement that had been worked out with the Department of State.

4 Now, we did not, prior to today, have copies of the papers that have been exchanged between the United States and Israel, between the Department of State and Israel.

But we did receive them just before we walked into the court, and they are attachments, and I think that really what they say—they are attachments to the government's response.

What they say, as well as what the answers, the sketchy answers to interrogatories that we have received say, is really quite interesting, and I think sustain the plaintiffs' position.

Our basic legal argument, Your Honor, is that it is—and this is the argument in its broadest form, and I will proceed from that to narrowing it to the facts of this case, but our argument in its broadest form is that Congress has set up a taxing scheme under which it has given the Commissioner of the Internal Revenue certain powers, and at times certain extreme powers.

But that the exercise of those powers, particularly the power to impose a jeopardy assessment, on the eve of an extradition

is in our view, in any event, unconstitutional. Because it amounts not to a tax, but to a forfeiture, Your Honor.

The government says that, if a person in the position of the plaintiff in this case, one who is surrendering himself,
5 and would be out of the country a day after the jeopardy assessment is served, has, in theory, an opportunity to go into the Tax Court some time in February, or 90 days after February, when they serve a 60-day notice, then that is sufficient for constitutional purposes.

We say that in no practical sense can that be viewed as being sufficient for constitutional purposes; and that, for that reason, a jeopardy assessment of that kind simply cannot stand.

Now, we are here before Your Honor in this case, both on the temporary restraining order and today on the preliminary injunction, not to enjoin an extradition.

I think we should make that clear, and I think we tried to make it clear the other day.

We have not come, and we did not come to court in any way, seeking that relief, as such.

The COURT. Is that not the effect of it, though?

Mr. LEWIN. Well, no, Your Honor. What we have done—what we have done—is sought to remove from the plaintiff the forfeiture that is imposed by the Internal Revenue Service.

Now, that can be done in either one of two ways:

It can be done by an order removing the jeopardy assessment, which, we submit, the court has ample authority to do, notwithstanding what the government says. The court has
6 more than ample authority to direct the Commissioner of the Internal Revenue to remove the jeopardy assessment when that jeopardy assessment would be unconstitutional.

Now, as an alternative—and we propose it only as an alternative—the court has the authority to say to the Secretary of State and to the Department of Justice: Now, you must defer any action you will take which will prevent this man from contesting his tax liability until such time as he has an opportunity to challenge it.

In other words, what we are saying is that the government, by common fairness, by constitutional standards, can do one of two things:

It can extradite this individual and leave for a later date the question of his tax liability in the ordinary course, or it can say:

We wish to impose the tax liability, and, therefore, we delay his extradition.

Let us just assume for a hypothetical that the United States Government were interested in a criminal prosecution of somebody who was going to be extradited.

I submit it would plainly be unconstitutional to say to a man who was going to be extradited tomorrow: You are scheduled for trial on your criminal case the day after tomorrow, and if you do not appear, then you will simply be tried in absentia, and you can be convicted in absentia.

I think, plainly, if the United States were to file an
7 indictment and have a criminal trial on those circumstances, any court in the country would say the United States must choose between either of those two alternatives. It must either prosecute the man, and extradition treaties have ample provision for delaying extradition in order to complete proceedings against the individual who is being extradited, or the government could say: We defer on the criminal prosecution until such time as the indicted defendant returns and permit him to be extradited.

Now, the effect, on the other hand, of what the government has done in this case is to put this plaintiff and his wife, who is also a plaintiff, and who is an innocent third party, to an absolutely impossible situation.

The government has essentially said to these people: We are going to do both. We are going to throw you out of the country. We are going to surrender you over to a foreign government, and at the same time we are proceeding with a Tax Court procedure which essentially says that we filed a notice. If you do not petition the Tax Court within 90 days after that, then your property is forfeited.

The COURT. May I ask a question?

Mr. LEWIN. Sure.

The COURT. This assessment was levied for the years 1970, 1971.

Mr. LEWIN. Yes. Yes, Your Honor.
8 The COURT. And 1972, is that right?
Mr. LEWIN. No, not 1972, Your Honor.

The COURT. Just two years?

Mr. LEWIN. Just two years.

The COURT. Did he file a return in 1971, and did he pay any tax?

Mr. LEWIN. He filed a return in 1971, and I am advised he paid a tax in 1971.

The COURT. How much?

Mr. LEWIN. I don't know the exact amount. Mr. Shapiro is going to get me a copy of his income tax return. I don't——

The COURT. I think your co-counsel is getting it for you.

Mr. LEWIN. No, I know we do not have a copy of the return yet. I have received a copy of Mr. Shapiro's 1972 return.

The COURT. Do you remember what the representation was by the government the other day?

No tax was——

Mr. LEWIN. No, I don't recall, Your Honor.

The COURT. Didn't Mr. Rankin tell me no tax return was filed, and no tax was paid?

Mr. FUERTH. Your Honor, for 1970 there was no return filed.

9 For 1971 there was a return filed. If Your Honor will give me just a moment, I have it right here in my briefcase.

There is a small amount of income shown. I can't recall at this point whether there was any tax paid.

The COURT. All right.

Mr. LEWIN. I think there was a small amount of income. I believe there was a tax. I am not sure. But there was a return filed for 1971. The taxpayer was here for only part of 1970.

I understand he did not engage in any activities during that year which would require him to file any return, at least according to what he has explained to me. He came at some point in the middle of 1970.

The COURT. How did he come into the country, legally or illegally?

Mr. LEWIN. He came into the United States—Your Honor, I candidly do not know the details of how he came into the United States.

Let me say one thing. The government has made a representation in its papers that he was here illegally, and that the Immigration Service arrested him.

The Immigration Service did arrest him and charge him with being an overstay. He is here as an alien. When his

Immigration Service attorney spoke to the Immigration
10 Service officials, they told him that they arrested him at the request of the Israeli Government, which was going to be filing an extradition request.

In other words, I don't think—and there was never—and there was never, although he was arrested in June of 1972, Your Honor, between June of 1972 and December 2, 1972, the Immigration Service did not proceed with its proceeding. It kept continuing it and continuing it, saying that they understood the Israeli Government was going to be asking for extradition, and there was no purpose in proceeding with any Immigration Service proceeding.

There was no legitimate—I submit that that demonstrates that there was really no legitimate Immigration Service interest, as such. They were acting on behalf of the Israeli Government, which had informally said to them: Well, if you arrest him, then, you know, he will be here, and we will have an extradition application.

And there are various other—I might say the government, Mr. Rankin, who admitted that he had a very brief acquaintance with the case, and the facts of the case, gave Your Honor a recitation last week which I did not dispute in detail because I did not think it served any purpose at that time.

But I think there also appear in the motion to dismiss various assertions regarding Mr. Shapiro, and the
11 charges made against him, which we would strenuously contest, Your Honor.

And there is no question about this:

That there is an outstanding indictment against him on a charge that arose out of his conducting an investment company in Israel.

That charge, I might say, was one which, if the government wants to go into the facts—and we did not want to go into the underlying facts of the extradiction in this court; we did not think it was appropriate, but——

The COURT. It has already been litigated.

Mr. LEWIN. Yes, it has already been litigated.

The COURT. So it is res judicata.

Mr. LEWIN. But just simply to clarify that point, the charges that were made against him in Israel were only made a long time after the matter was aired, and, we submit, because of political pressure in Israel.

Now, I should point out again in that regard to Your Honor—and it relates to the basic claim that we have made—that in the first diplomatic note sent by the Department of State to the Israeli Government—and it appears as an attachment, I think, of Government's Exhibit 1, with the papers that they filed with Your Honor—the concluding paragraph of that note specifically states, with regard to the reasons for Mr. Shapiro wanting the conditions from the Israeli Govern-
12 ment, that Mr. Shapiro's express motives are:

One, his desire to be in the United States for the birth of his child; and,

Two, his fear that he will be imprisoned prior to his conviction or acquittal in order to satisfy the desires of his politically motivated accusers.

Now, that has been the claim from the outset, that Mr. Shapiro has said; and, as I said, from the first day I represented him—and I spoke to the United States Attorney in New York—I said, "This man is ready to go back if he can be released on bail in Israel and can stand trial."

There was no interest expressed at that time by the Assistant United States Attorney, and none, until the matter reached the Department of State in the middle of December.

Now, in that regard——

The COURT. All right. I am sorry I got you on a detour.

Mr. LEWIN. It is an excursion, but I think in some ways maybe it is relevant to the flavor of the case, Your Honor, because I think there may be some suggestion by the government—and they talk about soiled hands or something—that this is a vicious malefactor who in some way has to be returned to Israel.

That is just, I think, plainly and unequivocally un-
13 true, which is demonstrated in part by the fact that the Israeli Government, you know, was willing to make the accommodations it did and by the fact that even on the initial appearance before the judge in the Southern District of New York he was released on bail.

There has been no suggestion that he is fleeing any place, or going off anywhere. Those suggestions are simply untrue.

There is also a comment some place that he fled Israel. The fact of the matter is that under Israeli law a charge has to be filed against an individual from the time preliminary pro-

ceedings are brought within 180 days of the time that the arrest is made.

After that any bail lapses, and, in fact, the bail in this case did lapse. There was more than 180 days between the institution of the charge and subsequent proceedings.

These is no claim made by Israel that they are entitled to any bail money or anything, or that he jumped bail in any way.

But let me get back to the details of this case. As I say, our broadest contention—and it is one that the court need not reach on the facts of this case, but which I think squarely presents the legal issue—is that the Government of the
14 United States cannot do both things at one time.

They can't say: We forfeit your money, and we send you out of the country under an extradition warrant.

It can choose one or the other, and it can say: You will be extradited. If it says: You will be extradited, then it waits until the individual returns and has a tax proceeding in which he can litigate the validity of that tax, Your Honor.

That opportunity simply was not given to Mr. Shapiro. And we think on that basis—and Mr. Fuerth has admitted to Your Honor that he knows of no other case in which a jeopardy assessment has been levied, together with an extradition.

We submit we know of none.

Because I was representing Mr. Shapiro in this extradition matter, I did exhaustive research into extradition, and I have never found a case where the Government of the United States acted so arbitrarily and so outrageously with a man whom they were extraditing and said on the eve of his extradition: Now, we are going to take all of your money.

We submit that Your Honor can, and should, simply under standards that the courts have applied under due process standards rule that a jeopardy assessment under these circumstances is a taking of property without due process.

Now, we have also cited in our memorandum a case
15 which I think counters completely the government's argument that there is no authority to remove a jeopardy assessment. That is the *Lambe* case decided by a district judge in California where there was—the case is unreported, but we submitted with our memorandum a copy of the judge's opinion in that case.

But there was in that case an agreement as part of the plea bargain in which the United States Department of Justice had

engaged by which the defendants were given certain assurances regarding what the future had in store with regard to any kinds of punishments or exactions.

Thereafter, the Internal Revenue Service, claiming as it does in this case, that it is a separate arm of the government and was not a party to the agreement, went out and levied jeopardy assessments.

The district judge issued an order, and the order appears in full as an appendix to our memorandum, on August 15th of this year in which he directed the Internal Revenue Service to enjoin them from assessing, or attempting to assess, any tax. He essentially lifted the jeopardy assessments, Your Honor.

He did so on a finding that the Internal Revenue Service could not disclaim the promises made by other agencies of the government. The opinion appears as Exhibit 6 to our memorandum.

16 The COURT. It was filed in that court on August 15, 1973.

Mr. LEWIN. Yes, Your Honor.

And the court specifically found that the Internal Revenue Service could not disclaim what had been stated by the Department of Justice.

The court in Finding 14, which appears on page 5: "A denial of the relief would constitute a deprivation of property without due process of law and would be the taking of private property for public use without just compensation in derogation of the Fifth Amendment to the Constitution of the United States."

The COURT. Wait a minute. I do not have page 5, sir.

Mr. LEWIN. I am sorry. Not of the order, Your Honor.

The COURT. I have page 4 of the order.

Mr. LEWIN. But the immediately preceding document is the opinion, Your Honor. I am sorry. Exhibit 7 is the order. Immediately preceding that is the opinion, the findings of fact and conclusions of law.

The COURT. All right.

Mr. LEWIN. At page 5 of that opinion, as I said, the judge said that it would be unconstitutional for the jeopardy assessment to stand.

17 He said in Finding 16:

"By reason of the special or extraordinary facts and circumstances of this case, the anti-injunction act of the Inter-

nal Revenue Code does not prevent the equitable relief prayed for by the defendants."

Now, we submit that the constitutional argument applies as fully to this case, and, indeed, more so to this case, than it did to the Lambe case.

Because in the Lambe case the parties were in the United States. They had every opportunity to raise the issue that this had been part of the plea bargain in a proceeding that they filed, and a petition that they filed with the Court, for that matter, exactly what Mr. Fuerth is urging Mr. Shapiro.

They could file a petition with the Tax Court. This assessment is improper. The jeopardy assessment is because we have been given certain assurances.

Mr. Shapiro does not have that option. Mr. Shapiro will be out of the United States. He will be unable to consult with counsel. In terms of the facts regarding the tax claim made against him, there is no opportunity for me even to discuss them with him prior to the time of filing a petition in the Tax Court.

As I say, that is our broadest argument:

That in no event—and I submit there is no precedent
18 for the government ever having done it—in no event may extradition be combined with a jeopardy assessment.

Let me turn briefly to why it is not necessary for Your Honor to reach that broad ground, and that is because in this case there are two factual circumstances.

One is the delay of time which emerges, I think, inferentially from the record; and, even more so, from the answers to the interrogatories, sketchy as they are, objected to as they were, by the government, that the government has served upon us today.

An the second relates to the bargain between the plaintiff and the government.

With regard to the lapse of time, it appeared strange to me, when it happened, that on the day before, one working day, as I say, before Mr. Shapiro was scheduled to leave, the jeopardy assessment was filed without any prior request to him, any prior contact that would amount to questioning whether his taxes were proper.

If this is simply a matter of the United States seeking to obtain a tax obligation, or recover on a tax obligation which a tax-

payer has, I would have thought that they would have been able to contact him earlier.

So we inquired in an interrogatory, which Your Honor directed that the defendants answers, and one of the few interrogatories they answered indicated—the question
19 was whether—when the inquiry—what date, we asked, did investigation or inquiry begin?

The answer was the investigation was first assigned to a special agent on September 17, 1973.

Now, the first thing, of course, that registers in my mind—and I am not a tax expert—is that I know that special agents are not ordinarily civil audit agents of the Internal Revenue Service.

An investigation does not begin with a special agent. I have never heard of it beginning with a special agent.

The COURT. You are not correct.

Mr. LEWIN. All right.

The COURT. You are not correct. I remember from my days in private practice that you should inquire, when somebody coms around from IRS in regard to a given client as to whether the agent is a special agent or a revenue agent. If he is a revenue agent, it is a civil matter. If it is the other, it is a criminal proceeding, a criminal investigation, sir.

You do not have to be a tax lawyer to know that.

Mr. LEWIN. Right, Your Honor.

The COURT. So that was the tip-off on September 23rd as to what the government was up to.

Mr. LEWIN. All right. But if they were looking——
20 The COURT. Isn't that right?

Mr. FUERTH. That is correct, Your Honor. A special agent is charged with the enforcement of the criminal law.

The COURT. All right.

Mr. LEWIN. Now, if they assigned this matter to a special agent on September 17th, I asked the special agent, whom I met on Monday of last week when I went up to New York and met with three revenue agents at that time, I asked him, you know, "Special agents are criminal investigators. Are you here for criminal tax purposes?"

He said, "No. I just began—at some earlier point I was involved in the investigation, so I am here because I was involved with the investigation earlier."

But, in any event, I submit that the government has not answered when the Internal Revenue Service began any kind of inquiry.

They have indicated when it was referred to a special agent, which, to me at least, indicates that they began looking into the civil aspects at some earlier date.

But even accepting September 17th, the next interesting thing is that the government says that it learned——

The COURT, Well, I have read the answers they gave, so you do not have to go over that, and your time has expired.

Mr. LEWIN. Right, Your Honor. Let me just point up a few things in that regard, if I might, just because I know I did touch on some other points that Your Honor inquired about. I do not want to go over my time, but I would just like to direct it.

The special agent, according to the answers to the interrogatories, the special agent learned about the extradition by interviewing the Immigration Service and then by interviewing a consul of Israel, who advised the special agent on November 28, 1973, that Mr. Shapiro was due to depart the United States on December 9th.

Now, again, those strike me as being remarkable avenues for the Internal Revenue Service to inquire from, before they even check with the taxpayer and ask for the taxpayer's books and records.

Although I did not make any allegation at last week's hearing that this was done, the jeopardy assessment was in any way done, by, or on behalf of, the Israeli Government, to see that this man cannot raise bail, I begin to wonder when I see that there were discussions by the special agent with a consul of the State of Israel on November 28, 1973, regarding this matter.

And, thereafter, on December 6th, the jeopardy assessments were levied.

I begin to wonder whether it wasn't pursuant to that discussion that it was agreed upon that the assets that Mr. Shapiro had in the United States were in some way going to be forfeited or seized so that he would not be able to make bail when he gets to Israel.

Now, as I say, that is just one of the aspects that comes out of the answers to the interrogatories:

That rather than being a bona fide tax investigation, the IRS, it looks to me, is in some way, after discussions with the Israeli Government and after discussions with the Immigration Service, trying to freeze this man's assets.

But that is why—that is just one of many factors which I think narrow this case. The court need not decide that every jeopardy assessment, in combination with an extradition, is unconstitutional.

But, certainly, where there is no request made, or no information given to the taxpayer during a period that, I submit, is, by their own interrogatories, a month and a half prior to the extradition—and I submit really longer if one goes back to determine whether there was someone in the Audit or Intelligence Division who was handling the case before the special agent—if there is no inquiry made by the Internal Revenue Service over this extended period of time, let me say an extended period of time, when, as we say in our verified complaint, there was no fear, there could be no fear on the part of the Internal Revenue Service, that these funds would disappear, because the funds which they have levied upon were all subject to bond for his appearance at the Immigration Service and at the district court.

So there could be no argument by the Internal Revenue Service that if they asked Mr. Shapiro about his tax liability in October, or in November of 1973, the money would disappear. Because the money was irrevocably here until such time as he would leave the United States.

So they had every opportunity to talk to him and engage in a bona fide inquiry and ask him to produce books and records to explain anything that they might have.

In addition to that, the Internal Revenue Service does not, to this date, even want to specify what the liability would be, or even remotely suggest on what basis they are claiming any liability.

Third of all, all of this occurs against the background of an agreement, and, here, again, the document that is present to Your Honor, I think, is very important, Government's Exhibit 1, attached to its paper, that first note to the State of Israel from the Department of State.

It concludes with the Department of State saying to the State of Israel that Mr. Shapiro's request for these terms is

based upon his fear that he will be imprisoned prior to his conviction or acquittal.

24 Now, that was raised at the very outset. That is exactly what we told the State Department. That is exactly what the State Department told the Israeli Government:

That the purpose of this agreement is so that he will not be imprisoned prior to conviction or acquittal.

In response to our papers, the Department of State has even put in a letter which I sent to the State Department in November, at the end of November of this year, stating in writing that we wanted the Immigration Service proceeding terminated so that the money in that Immigration Service proceeding could be used for his release on bail.

So they knew well before December 6th that that money would be needed to release this man on bail in Israel.

So the facts of this particular case make it far more outrageous and far more in the way of over-reaching on the part of the Government of the United States than simply a case of any jeopardy assessment attached to an extradition.

What it says essentially is that the United States not merely can forfeit a man's property before it extradites him, but can do so even though they wait until the eve of the extradition in order to seize his property. So that he has no recourse except possibly the extraordinary recourse of having obtained—of obtaining an injunction from a court.

That he has no recourse that they can wait until then; that they can do so notwithstanding the fact that they

25 refuse to make any kind of a showing at all to a court, or to the taxpayer, of what their claim is based on.

And I am ignorant to this day, other than their saying that there is an understatement.

And that they can do so in the face of the express purpose of an understanding by an exchange of notes between the United States and Israel, and an exchange of correspondence between the Department of State and the plaintiffs' attorney, that the purpose of all of this was to allow him to be released on bail in Israel.

Now, we submit that there is ample authority. The Lambe case in the district court, we think, is clear authority for this court's action to enjoin the jeopardy assessment.

We think the government argues—and I have briefly read over their paper, but the government argues—that there is no authority to enjoin an extradition.

Well, if they are talking about authority, I think plainly there is, if the extradition were unconstitutional. If tomorrow suddenly the Secretary of State, without any procedures, were to sign an extradition warrant for my associate there and propose to ship him out to Argentina, I am quite sure I could go into a district court right here and enjoin that extradition as being contrary to law and unconstitutional.

26 The notion that no court can interfere with an extradition is just plainly wrong.

Now, the notion that you can't look behind the merits of the extradition proceeding, that it is not Your Honor's job to look behind the merits of that, is plainly right.

And that is why we have in no way in this case suggested or argued or in any way attempted to have Your Honor review any part of that decision. We recognize that that is a clear limitation, and the extradition is as given.

The question is only whether today the United States may say to this man, on the basis of all of these facts, and on the basis of the hardship to his wife—his wife is here in court, Your Honor; and, although it was hard for her, I brought her down because I thought it might be useful to present her testimony on the record as to what the hardship would be to her, if her husband were to be forced to leave under these circumstances.

But the hardship to an extradited individual in these circumstances and to his wife, who is a plaintiff, I think, is such that simple justice—I mean the simple due process provisions of the Constitution of the United States, and the Fifth Amendment, require that a court step in and say to the United States: You can have one, or you can have the other, but you just can't have both at once.

27 Thank you.

The COURT. All right, Mr. Rankin.

Mr. RANKIN. At the outset, Your Honor, if I may respond to a few questions that came up during counsel's argument, one relating to the tax return of 1971, our tax return shows that there was a small amount of income.

It appears to me that there is just a gross income of $1600. It appears to be a total income of $1600, on which no tax was paid.

The COURT. All right.

Mr. RANKIN. Again, at the outset, Your Honor, I would like to discuss briefly several points that were raised by plaintiffs' counsel.

Throughout the course of his argument, he asserted that these levies pursuant to a jeopardy tax assessment are, in fact, a forfeiture.

Consistently, he argued that this was a forfeiture of this plaintiff's funds.

This is simply incorrect, Your Honor. Plaintiff has the opportunity to contest. If the plaintiff wins, he then is entitled to the funds, subject to whatever other liens there may be. But our lien would be off.

It is, in effect, a lien, and it is not a forfeiture, Your Honor.

> Every person who is subject to a jeopardy assessment
> 28 where property is levied on prior to tax litigation is subject to having his property seized or withheld from his use.

Plaintiff is in no different position than any other person under these procedures, and if he succeeds in his tax litigation, the government has no interest at all in that property.

The COURT. Would you not say that it is possible you could distinguish this case from the others by virtue of the rather unusual agreement negotiated on behalf of the plaintiff by and through the State Department with the Israeli Government?

Mr. RANKIN. If Your Honor is suggesting that this agreement was by the State Department, rather than simply possibly through the State Department——

The COURT. I said "through".

Mr. RANKIN. I thought the court said "by and through".

The COURT. That is correct.

Mr. RANKIN. I would like to get to that point, Your Honor, because I think——

The COURT. Well, I do not want to derail you or send you on an excursion that is not relevant to the issues, Mr. Rankin.

But it does appear to the court that the facts of this
> case may make the situation that we are dealing with
> 29 sufficiently unique so that you do, in the final analysis, have only one of the two options suggested by the plaintiff.

On the other hand, I, obviously, am concerned by the very serious allegations which you have already alluded to in prior proceedings:

(a) About the possible lack of this court's jurisdiction; and,

(b) If I were to enjoin the government from proceeding with the extradition, I would be interfering with the jurisdiction of a sister court, possibly doing violence to the principle of comity.

I hope everybody would grant that I certainly do not want to do an injustice to either of the parties, but I do not want to act contrary to the court's jurisdiction, either.

I think those matters are very serious, the jurisdictional question, and I think that is the threshold issue that the court must decide.

Maybe I can phrase it this way, Mr. Rankin, as a threshold matter:

The extradition order entered by Judge Pollack in the Southern District of New York is not contested here. It is not subject to collateral attack in this court. Plaintiffs' counsel conceded as much, specifically.

Yet, at the same time, they ask this court to exercise its
> equitable jurisdiction, which they urge is not subject
> 30 to the anti-injunction statute because of the peculiar facts of this case; and that if the court were not to enjoin the execution of these levies, or to set aside this jeopardy assessment, it would be tantamount to a denial of the plaintiffs' right to procedural due processs.

Whether it would be tantamount to a forfeiture or a penalty is another matter, and it might be stated that way, too.

But you have heard their arguments.

Now, I think that what would be most helpful to the court would be for you to address yourself to the jurisdictional aspects of the matter, because that may save me a lot of time, Mr. Rankin.

Mr. RANKIN. Very well, Your Honor.

The COURT. I do not want to be presumptuous. You tell me whatever you had planned to tell me, and need to tell me.

Mr. RANKIN. After hearing plaintiffs' argument today and the characterization by the plaintiffs of the facts of this case, as we see it, I think it is essential to our case, and to this court's understanding of the case, to briefly discuss three or four factual points to put the jurisdictional arguments in a proper context.

572-247 O - 75 - 8

The COURT. All right.

Mr. FUERTH. First of all—well, before that, I would like to say it seems to me that plaintiffs' concern here is, and
31 has been for some time, simply to keep this man out of jail.

This is clarified somewhat in their preliminary injunction papers. This is the purpose, and plaintiffs have sought, administratively and judicially, to achieve this freedom, and they have been very successful in doing so.

Now, we submit, Your Honor, that there is no power of this court, or of the Government of the United States—and I am speaking of the Executive Branch—to guarantee plaintiff's freedom when he returns to Israel.

As an alternative, it would appear that plaintiff says, "Well, in any event, if I am extradited, I would like to have those moneys available to use in possibly achieving bail."

But, Your Honor, this would require the setting aside of these tax levies to enable him to have that money, and, as we will show later in this argument by legal precedent, the relief must be denied.

We submit he has not made sufficient allegations under Enochs and it flies in the face of the precedent that claims of denial of due process must be made in the context of tax litigation, which has not started yet, and it is premature, Your Honor.

Now, if I may go to these factual matters, one involving this agreement that we have heard so much about, and I think it is essential that we understand what this agreement
32 was.

As this court is well aware, plaintiff had exhausted remedies all the way up to the Supreme Court, where the Supreme Court en banc denied a stay of his extradition.

So, for all intents and purposes, that was the end of the matter, except plaintiff filed a writ for certiorari. But, in any event, there was nothing to stop extradition.

Thereafter, plaintiff proposed than he would voluntarily surrender and dismiss his petition for certiorari if Israel would make certain assurances to him, and not if the Department of State would.

The Department of State forwarded this to Israel. Israel came back with a diplomatic note on September 4th, Your Honor.

The COURT. Agreeing to the three conditions, is that right?

Mr. RANKIN. Just a moment, Your Honor.

Your Honor, the second point is, as to the release on bail: Israel stated, "The state will raise no objection to Mr. Shapiro's release on bail. It should be, however, noted that the court, alone, is vested with the final discretion in this matter."

Now, that is very clear, and plaintiffs' counsel is very familiar with that, and this court is. It is not up to the
33 Ministry of Justice in Israel to say whether or not the man eventually will be released.

They said the most that they could say, and, that is, that they would not oppose it. That was the agreement, Your Honor.

It is no guarantee of release over there, which has been the characterization of this case by the plaintiff: that the government somehow has agreed or guaranteed that this man will be released when he is in Israel. That is simply not the agreement.

This September 4th agreement is in effect at the present time.

Although there was one point where Israel reneged on it, the Department of State suggested that they reconsider it. They did, and reinstated it. So this is the agreement. There is no guarantee. It is simply that.

Secondly, plaintiff tries to state that his withdrawal of the petition for certiorari in some way denies him due process Your Honor.

Now, plaintiff dismissed that petition for certiorari based on these assurances that he had received from Israel, not from the Department of State.

He claims that Israel later reneged. That is true. The State Department immediately called plaintiffs' counsel and advised him of this and said, "Don't submit a stipulation from
34 the Solicitor General if you receive it."

Nevertheless, plaintiff went ahead and submitted that signed stipulation.

The agreement was later reinstated so that really that is irrelevant to the case, but that was a big point in plaintiffs' papers.

The third point, Your Honor, is that plaintiff has consistently argued that encompassed in an agreement somewhere was an assurance that included a guarantee that he would be entitled to use moneys in Israel for bail over there.

This is simply not supported by the record, Your Honor.

Israel told the plaintiff, at his inquiry, that bail would be recommended, it is my understanding, or would be set at $50,000.

Now, obviously, the Ministry of Justice cannot control the court, or what the court might set, when he is over there. The Ministry of Justice, or the Department of Justice, can recommend what bail should be.

The COURT. What you are saying is that judges in Israel probably are like judges in the United States. They do not always agree with the government.

Mr. RANKIN. Yes, Your Honor.

The COURT. Is that right?

Mr. RANKIN. I think that is what I am trying to say.

35 The COURT. All right.

Mr. RANKIN. However, after the assurances, Your Honor, and after the withdrawal of the petition for certiorari, and after a determination, and agreement, by the parties on the date that Mr. Shapiro would surrender himself, on November 27th, plaintiffs' counsel wrote a State Department representative, and this was a very crucial letter concerning bail moneys.

This was the first time that this issue was raised, long after any agreement, and now plaintiff says that this was part of an agreement, that the government is breaching because he is guaranteed to have moneys when he goes back. This simply is not the fact, Your Honor.

On November 27th, after the date had been set for the December 9th surrender, plaintiffs' counsel says, sort of as an afterthought, that, "I have been reminded by Mr. Shapiro's lawyer in New York, his Immigration lawyer in New York, that we still have an outstanding matter resolving the bond on the Immigration proceeding."

That is the first time that plaintiffs' counsel brought this up, to my knowledge, from thoroughly reading the records in this case.

So I suggest to you there was absolutely no agreement with regard to bail money.

There is one final point I would like to make on these facts, and that is concerning an alleged conspiracy or bad

36 faith or collusion on the part of IRS and the Department of State.

The allegations are that IRS must have known about this for a long time. Your Honor, we have filed a sworn affidavit today, which has not been opposed at all by any sworn affidavits on the part of the plaintiff, and which cannot be refuted. The special agent is in the Court House, and he will tell this court that he did not know, or did not institute an investigation, until after he was assigned the investigation on September 27th, or September 17th, I believe; and the actual investigation commenced on September 24th.

He also stated that he had absolutely no information of the extradition proceedings until October 31st, and that at that time a lawyer from the Immigration Service advised him of them, but said that these matters were on appeal.

That is October 31st.

Later, on November 28th or 29th, I believe, he first learned that a date had been set for this man's extradition. So we are talking about seven or eight days from the time IRS learned of the date this man was leaving the country. We are talking about less than that. We are talking about six or seven days, until the time the jeopardy assessment was entered.

Now, it is inconceivable to me, Your Honor, that this

37 can be considered an unreasonable length of time in which to act in a situation, which IRS faces in many situations, when they are about to lose someone, or assets, that they deem that they have a claim to.

Congress has provided for this procedure, and it has consistently been followed by IRS. This is exactly what happened in this case.

Yet, plaintiffs try to take that and take it back to the entire discussions concerning the extradition and draw them up into one big ball and say there is deprivation of due process here.

There is absolutely no agreement that this man is going to have bail money over there.

There is nowhere in the record an agreement, a written agreement, an oral agreement, a stipulation, that he would be entitled to that money.

We submit, Your Honor, that the IRS did exactly what Congress said it should do in levying a tax assessment. Clearly, if this man had been extradited or had voluntarily surrendered and the money in some way followed him, the United States in a later tax proceeding, even if it prevails, does not have assets to cover the tax deficiencies.

This is the purpose that Congress had in passing this litigation, and we submit, Your Honor, it was properly followed in this case.

38 There is no scintilla of bad faith or collusion on the part of the government.

I might add, when the plaintiff makes such allegations, Your Honor, the federal rules require that they be made with particularity, and we have no particular allegations on those points.

Now, in the context of that, the court has already indicated—and I am sure it has—that it has read these papers with regard to the extradition.

We submit, Your Honor, simply that the court lacks the jurisdiction to enjoin an extradition.

The agreement was worked out with the Government of Israel. It has been in effect since September 4th, and there were no guarantees on the part of the Department of State.

Matters of extradition under treaties with foreign countries are non-justiciable.

The President and the Executive Branch of the government have full authority over such matters, and we submit, Your Honor, that the court simply has no jurisdiction over this matter.

Moreover, there is no authority, Your Honor, that we know of, for the court to delay an extradition that is final; that the warrant has been signed; and that——

The COURT. I think you made a misstatement, Mr. Rankin.

39 Mr. RANKIN. Maybe I did.

The COURT. You said matters of extradition under treaties——

Mr. RANKIN. Under treaties are non-justiciable.

The COURT [continuing]. Are non-justiciable.

Mr. RANKIN. That is correct.

The COURT. Well, if that were so, how did Judge Pollack order the plaintiff extradited?

Mr. RANKIN. Your Honor, that is a statutory proceeding that has to be followed under the statute.

The COURT. Pursuant to the treaty.

Mr. RANKIN. I mean pursuant to the treaty.

The COURT. So it was under a treaty and under a statute.

Mr. RANKIN. He has to be found extraditable, Your Honor.

The COURT. Correct.

Mr. RANKIN. Before any final action is taken by the Secretary of State to have him extradited.

The COURT. Well, I have no quarrel with you about that.

Mr. RANKIN. But that is not relevant here, because that has been challenged all the way up, and that is settled, Your Honor.

The COURT. I understand that, but I think that state-

40 ment is erroneous.

Mr. RANKIN. Very well, Your Honor. But we submit that, once the courts have finally reviewed the extraditable nature of an individual, and once the Secretary of State has signed that warrant and has given it into the hands of the foreign country, that, for all intents and purposes, the extradition is over, and this court lacks any power to delay or enjoin such extradition.

Since, as we submit, the court cannot interfere with the surrender to Israel, plaintiff, it appears, would then have this court set aside the notices of levy.

As we have said before this would obviously take away the right that the United States has to these tax funds, if, in fact, later they are adjudged to be correct. And this court is very familiar with the Enochs case.

The COURT. I hope so.

Mr. RANKIN. More so than I am, Your Honor, I have to admit.

We submit, and have thoroughly briefed in our papers, that, clearly, this does not come within the two exceptions to Enochs, the two statutory exceptions, nor does it come within the judicially created exception.

And, basically, we say that for this reason, Your Honor:

We submit that the plaintiff has a burden not of

41 making an argument, but, rather, with well-plead facts in its complaint, showing that the government cannot be wrong—or the government is wrong in what they are saying.

In other words, they are to come in and say, "I work here. I made so much money. I paid this much tax. Here is a copy of my tax return."

These are the matters, we submit, that have to be pleaded by a plaintiff in order to get injunctive relief.

Now, we talk about tax returns. It is my understanding that plaintiffs' counsel called up to New York after he learned of these tax assessments and sought to discuss these matters with the people in New York, the tax people.

They said, "Yes, we will discuss it with you. Bring whatever papers you might have."

When they arrived up there, I understand they had no papers with them.

So it is not that they did not have some opportunity to present something to the government that might have changed the government's mind.

But neither there, nor in their complaint, have they alleged facts which, we submit, bring them within Enochs.

Your Honor, Enochs goes further. It requires also that all other requirements for equity relief be met, and this is where we get to the clean hands argument, and we have briefed that in our papers.

42 We submit that plaintiff simply is not entitled to equity relief in this court.

The last argument which we have briefed concerns what we think, or what we have tried to understand is, plaintiffs' due process argument.

It seems, Your Honor, that they say that Mr. Shapiro had some right to these funds, and that by the denial of these funds, he will be unable properly to litigate a later tax case.

We simply say, Your Honor, that there are a lot of "if's" involved in this. There is a question if he will ever be released on bail in Israel. There is a question as to whether he will not be able to contact his counsel in the later conduct of tax proceedings.

We submit, Your Honor, there are so many "if's" that this simply is premature for this court to entertain some due process argument in that context.

The case law clearly shows that a person outside of the jurisdiction of this country can contest a lawsuit, and it is not unconstitutional.

We submit, Your Honor, that plaintiff, if he is unable to so conduct his lawsuit, can raise that issue in the proper forum, and that would be during the conduct of that litigation, whether it be in the Court of Claims or whether it be in the Southern District of New York.

43 But, Your Honor, we would submit that that is the forum where a due process argument should be raised that he is unable properly to defend himself at the Tax Court.

This court cannot determine whether or not this man is going to be deprived of any due process. If this court allows this man to take this money with him, there is no guarantee he is going to be released on bail at all. There is no guarantee that the bail is going to be $50,000 to $100,000, because the court has the ultimate authority.

But there is one guarantee:

Once this court lets the money go, even if the United States should later prevail in the tax case, they will not have the assets to cover that deficiency.

The COURT. The Supreme Court of the United States in *Enochs* v. *Williams Packing & Navigation Company*, the case that we have talked about, says:

"The question of whether the goverment has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that under the most liberal view of the facts and the law the United States cannot establish its claim may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and complaint must be dismissed."

44 Mr. RANKIN. That is correct.

And the court knows that the Internal Revenue Service has conducted an investigation, has come in with a tax deficiency, and has issued levies on this property.

Plaintiff has not come in and stated anything, in affidavit form or under oath, with regard to the amount of income he had, with regard to where it came from, with regard to how it was spent, with regard to how much tax was paid.

We submit, Your Honor, these would be well-pleaded facts that then put the burden on the government; and the government, if it has to, can come in and tell that plaintiff what it might have to.

But this is not a proper forum for litigating a tax case, and the government does not have to open up its investigation file to show to this court. That comes when the case is litigated in the Tax Court.

So we submit, Your Honor, that there is a burden on the plaintiff, in order to get this court to take jurisdiction even to look at this matter, which he has not addressed himself to.

The COURT. You would agree, would you not, if they make a proper showing, that the anti-injunction section of the statute is not an impediment to the relief they seek, provided, of course, the facts warrant it, and, secondly, if they come within the view or the standard, rather, of the
45 Enochs case.

Mr. RANKIN. I don't quite understand you. There are many standards in the Enochs case. Well, there are at least two.

The COURT. Well, Section 7421 of the Internal Revenue Code, I am sure you would agree, does not bar this suit, standing alone, if the plaintiff can make a proper showing.

Mr. RANKIN. That is correct. It does not bar the suit. That is correct, Your Honor.

The COURT. All right.

Mr. RANKIN. The only other point is: Even if maybe plaintiff has made a proper allegation, then you get to the question of whether he has met the other burdens for equitable relief.

But we submit on both counts he has failed, Your Honor.

The COURT. All right. Mr. Lewin I know you have a lot at stake, and I want to be most courteous to you. I think I understand your position, as eloquent as you are and as helpful as you have been.

The only thing that I perhaps could do would be to spend some more time trying to assimilate the papers that the government so carefully, but expeditiously, prepared for this court's consideration, and as you did, also.
46 I have just had an opportunity to skim them today.

I think I understand the arguments and the contentions of the parties.

I do not know what more I can learn from any further allocution or eloquence on your part, or the other side.

Mr. LEWIN. I appreciate that, Your Honor.

In the time that I unduly took in my opening argument, I did not address myself that directly to the jurisdictional and forum non conveniens point, which I think Your Honor raised with Mr. Rankin.

I wonder whether I might just speak to that. I appreciate that the hour is late, Your Honor.

The COURT. All right. I will give you five minutes, sir.

Mr. LEWIN. All right.

Let me say on the forum non conveniens point, interestingly enough, the government has filed no motion for a transfer to the Southern District of New York.

There is nothing, there is no reason, why this case can be better litigated up in the Southern District of New York on the legal and constitutional issues that we have presented than it can here.

Nobody is attacking Judge Pollack's order.

There are, according to the government, no particular witnesses that are being produced, or that have to be pro-
47 duced.

Consequently, I just don't see why this case has to be litigated in the Southern District of New York.

The COURT. They are willing to produce the Internal Revenue agent.

Mr. LEWIN. They said the Internal Revenue agent is in the building.

The COURT. That is right. And they presented an affidavit which is uncontroverted in the record.

Mr. LEWIN. Well, Your Honor, I am not sure. Was there an affidavit from the Internal Revenue agent? I have not seen that, if there were.

Mr. RANKIN. I believe there are answers to the interrogatories, Your Honor.

The COURT. You described it in your argument as an affidavit, I believe.

Mr. RANKIN. I think I said sworn—I am sorry, if I did, Your Honor. There are sworn answers to interrogatories.

Mr. LEWIN. Sworn to by Mr. Fuerth, and not by the Internal Revenue agent.

The COURT. That is correct. I am sorry about the error.

Mr. LEWIN. Your Honor, there is no reason, since the government does not have to transfer. It does not come under the language of the statute. We have a portion of our
48 brief that I would refer Your Honor to in that regard, because I think it is quite clear.

The COURT. I have already independently looked up the question of venue.

Mr. LEWIN. All right.

The COURT. I am not going to say that I have decided it, but I have looked it up and considered it.

Mr. LEWIN. All right, Your Honor. So in the brief time I have I am not going to elaborate on that point.

On the jurisdictional point, Enochs quite clearly reaffirms Nut Margarine, which said that in special and extraordinary facts and circumstances there is jurisdiction in the court.

The COURT. And you say this is a special and extraordinary case, based upon the peculiar and unusual facts, and, therefore, the court does have jurisdiction, and, therefore, the court should use its equitable powers to enjoin—to remove the levy, I suppose you want me really to do.

Mr. LEWIN. Yes, to remove the levy.

The COURT. All right.

Mr. LEWIN. But my point in that regard is that the government says, "Well, you should come in and plead specific facts."

This plaintiff has submitted tax returns. He has sworn that they are true.

49 He is suddenly told by the Internal Revenue Service, "You owe $90,000 in taxes," without the slightest word as to what this may be based on.

I was not—and I have to stand up here and take the court's time—I was not told, when I called the Internal Revenue Service, "Bring whatever papers you have." That is just downright untrue.

I said, "I want to come up there and find out what this is about."

And they said, "Fine, come on up."

And I came up, and I found out nothing as to what this was about, not a word.

Now, the plaintiff is ready to present his books and records. He is ready to present them. He is ready to plead them.

The truth of the matter is I don't know what to plead. I don't know what the claim is, Your Honor. I don't know on what basis the Internal Revenue Service has suddenly decided that this man owes $92,000 in taxes.

There isn't the faintest whisper of a suggestion of anything that I am supposed to plead to.

If what Mr. Rankin is saying is that he wants a complaint that says, "Appended are all my books and records, and I owe no taxes," sure, we will do that. We would like leave to amend the complaint, if that is what he is saying.

50 But I think that is, you know, totally unfair. If we have no idea, then there is nothing to rebut. The Tax Court does not proceed that way. The government must make a specific assessment of an amount that is due and state on what basis it believes it is due. Then you have an opportunity to rebut.

But never in the few years that I have been practicing have I ever heard of rebutting a non-allegation, and that is what this is. It is a figure. It is not an allegation. It is a number. Rebut $92,000 in taxes.

Now, you go and rebut that.

The government has put an absolutely impossible burden. That can't be what Enochs means. It just can't be. It must mean that if there is some showing, if there is some audit, if there is some inquiry, and some statement about what this is based on, then the taxpayer must come in and plead why it is that he does not owe the money.

Now, just on one other factual point that Mr. Rankin, I think, has represented, and erroneously, I submit, represented, Your Honor.

He said there was no statement as to whether Mr. Shapiro would be released on bail.

I checked with the former president of the Bar Association of Israel, who was in the United States, then told him that never—and he has a criminal practice—has a judge in

51 the State of Israel insisted on bail beyond what the prosecutor requested.

I think the Israeli authorities knew that, and I think it is for that reason, if Your Honor will look at Government's Exhibit 6, that the final note that the Israeli Government sent did not say that they would not object to his release on bail, but said specifically, "The Embassy of Israel wishes to add that in answer to the letter the Embassy has notified Mr. Lewin that the sum of bail on which Mr. Shapiro will be released has been fixed at 250,000 pounds in cash or by bank guarantee."

It says the amount on which he will be released. They know the realities as well as we do. That was the amount on which he will be released, because if that is what the government asks for, the judge may set a lower bail, but not a higher bail.

That is consistent practice in Israel.

I checked on that, as I say, with the former president of the Bar Association of Israel.

Then Mr. Rankin has tried to make it appear as if the State Department gave up nothing.

I think, if Your Honor will read Government's Exhibit 1, the State Department in its note to Israel said that they were concerned that Mr. ——— indicated that I would suit challenging the internal proceedings of the Department
52 of State in extradition matters, which, I submit, are not consistent with the statute or with any due process standard.

They said, "The Department does not believe that Mr. Lewin presents a strong case. However, the Department would rather not be subjected to a lawsuit, if this can be avoided. All of this litigation," they said, "may delay Mr. Shapiro's extradition."

Therefore, they requested Israel to act on the letters I submitted to them.

And in the letter that Mr. Tallerico sent to me—and it is appended as an exhibit to the complaint—he very specifically says, and he speaks of the "arrangement worked out between you [that is me] and Israel, or that between you and the Department of State."

The attempt by Mr. Rankin today to say that the Department of State had no arrangement is contrary to the letter that the Department of State sent to me; it is contrary to the note that they sent to Israel, in which they very specifically said to Israel, "Look, there may be litigation testing whether this extradition is at all lawful, because our procedures are improper. We don't want that kind of litigation."

They also indicated that they were concerned about the petition for certiorari.

And notwithstanding what Mr. Rankin has said here, well, the man could have been extradited immediately, the
53 note that the United States Government sent to the State of Israel said that the petition for a writ of certiorari has been filed; the court will not act on it before October; the court may grant the writ; and that may result in an actual delay of another year in the actual extradition.

Those are all things we gave up in exchange for an understanding that this man would be released when he arrived in Israel, an understanding that the Israelis understood full well and the Department of State understood full well.

We submit that those are the extraordinary circumstances that justify the issuance of an order of the kind that we have requested, which would, alternatively, lift the jeopardy assessment, or say, if that is what the United States chooses, we will permit the man to stay here and contest it.

Because to me—and I come back to the hypothetical I gave Your Honor initially—the government certainly cannot put a man through a criminal trial at the same time it was extraditing him.

I don't see why they could put him to a forfeiture really, of saying—it is just unrealistic, of saying—"Well, go ahead and file your petition in the Tax Court in February, because you have a counsel here, and we have not told you what the charges are."

Now, I would like, in view of the government's papers, to be given the opportunity, if we think it necessary, to
54 file a very brief response tomorrow, and then I come back to the matter of the extension of the temporary restraining order, which, if Your Honor can read the papers, we think at least there ought to be an oral order from Your Honor extending the temporary restraining order until such time as you rule on the preliminary injunction.

The COURT. All right.

Yes, Mr. Rankin.

Mr. RANKIN. May I briefly respond to several points, Your Honor?

The COURT. Well, all right.

Mr. RANKIN. I will try to be brief, Your Honor.

As to the issue of transfer, it is our simple position that this court, and any district court, lacks jurisdiction over these matters.

Neither this court nor the Southern District of New York should invoke any jurisdiction. Therefore, the case should be dismissed.

If any court has jurisdiction, we submit under the Smith case it is the Southern District of New York that has it, and not this court. Therefore, a transfer might be appropriate to that jurisdiction.

Now, as to Mr. Lewin's comments that Mr. Shapiro stands ready, if we open up our files, to try to resolve this matter,

Your Honor, the government has 60 days under the
55 statute within which to bring this action.

Now, the fact is the statute is being followed, and that should not be disrupted when there is absolutely no agreement on the part of the Department of State, or the Department of Internal Revenue, that Mr. Shapiro is going to be guaranteed funds when he gets back to Israel.

Pure and simple, Your Honor, we submit that the agreement of September 4th is one between Israel and Mr. Lewin; that the arrangement is clear; that nothing came up about funds until long after the time was set for the surrender.

So we submit, Your Honor, that trying to conglomerate these various points into some type of due process argument is unavailing for the plaintiffs.

Now, as to one other point, when I made the representation that Mr. Lewin was contacted and it was suggested that papers be brought, it was my understanding that Mr. Minsker, his associate, was called, and that the telephone conversation was with him.

But, at any rate, there is no sense in belaboring that. That is neither here nor there.

The COURT. I am not going to get into that any further, Mr. Rankin.

Mr. RANKIN. I would to point out for the Court's information one case in particular cited in our motion, and that is
the case of the United States versus Sidney A.
56 Brodson, 241 F.2d 107, cert. denied, 354 U.S. 911.

The COURT. What year and what circuit?

Mr. RANKIN. That is the Seventh Circuit, Your Honor, and cert. denied.

The COURT. What year?

Mr. RANKIN. In 1957 cert. was denied, and 1957 in the circuit court, also.

The COURT. All right.

Mr. RANKIN. That was an allegation of denial of due process of law, because the jeopardy assessment would deprive him of funds with which he could litigate the later tax case, the same as here.

The COURT. All right.

The court has before it obviously now a motion for a preliminary injunction, which, if granted, must comport with the standards laid down in the Virginia Jobbers case, which is so

well known that it is needless for the court to repeat the standards therein set forth.

The court also has the government's motion to dismiss, largely on jurisdictional grounds, on the basis that they say the Enochs case is applicable and that any exceptions set forth in the Enochs case standard cannot be met by the plaintiffs in the case at bar.

The court will receive these papers this afternoon and,
as it indicated earlier, it only had a brief opportunity
57 to peruse them.

In view of the importance of the issues raised, and the fact that both parties are entitled to the considered opinion of the court, and there being no reason apparent to the court why an additional 24 hours would injure the interests of anyone, the court will sign an order tomorrow morning extending the temporary restraining order only for the period of time necessary for the court to get out its opinion, and, as indicated, not in excess of more than 24 hours from five o'clock today.

In you want to present an order to that effect, Mr. Lewin, to morrow morning, after showing it to Mr. Rankin, it is all right.

But I think the Government of the United States, knowing at least Mr. Rankin as I do, will abide by that without a formal order.

Mr. RANKIN. Yes.

Mr. LEWIN. Your Honor, if we can get a representation from the government that that will be abided by, then we do not need a formal order.

Mr. RANKIN. We will abide by that, Your Honor.

The COURT. I knew you would, and I know you will. All right.

If you want to submit any other papers, you had better
burn some midnight oil, like I used to do, and have them
58 in my chambers by nine o'clock tomorrow morning.
Otherwise, I will not have time to consider them.

I will call you as soon as I am ready, and probably instead of writing an opinion, will deliver it from the bench, so that you will know precisely the reasons for what I am going to decide, which, as I said before, you are both entitled to.

The court will be in recess until tomorrow morning.

[Whereupon, at this point the court adjourned.]

[Jurats omitted in printing]

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[Filed December 21, 1973]

In the United States District Court for the District of Columbia

[Title omitted in printing]

RESPONSE TO PLAINTIFFS' INTERROGATORIES SERVED ON WEDNESDAY, DECEMBER 17, 1973 PURSUANT TO THE ORDER OF THIS COURT OF DECEMBER 18, 1973 ORDERING THAT ANSWERS OR OBJECTIONS BE GIVEN TO THOSE INTERROGATORIES WHICH THROUGH REASONABLE AND GOOD FAITH EFFORTS, THE DEFENDANT, THE COMMISSIONER OF INTERNAL REVENUE, COULD OBTAIN

The defendant, the Commissioner of Internal Revenue, through his attorney, Stephen G. Fuerth, trial attorney, Tax Division, Department of Justice, gives the following answers or objections:

1. Question. On what date did the Internal Revenue Service begin an investigation or inquiry of any kind regarding the income tax liability of Samuel Shapiro for 1970 or 1971?

1. Answer. The investigation into the income tax liability of Samuel Shapiro for the years 1970, 1971 and 1972 was first assigned to a special agent for investigation on September 17, 1973. However, because of a prior commitment to be on jury duty, the agent did not actually commence any investigation until September 24, 1973.

2.(a) Question. Was there any communication between officers or employees of the United States Department of Justice, including representatives of the Office of the
2 United States Attorney for the Southern District of New York, with any agent of the Internal Revenue Service with regard to this matter?

2.(b) Question. State the times, places and participants with regard to any such communication.

2.(c) Question. State the contents of any such communication and whether done orally or in writing.

2. (a), (b), (c) Answer. This interrogatory is objected to as being too broad in that it seeks information with respect to every employee of both the Department of Justice as well as every employee of the Internal Revenue Service; the information sought is irrelevant and immaterial to the matters presently before the Court; it is burdensome and harassing and calls for interoffice communications which are privileged.

3. Question. State the basis for the assessment in the amount of $6,843.68 for the income tax liability of Samuel Shapiro for 1970.

3. Answer. This interrogatory is objected to on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information herein sought is irrelevant and immaterial to the matters presently before the Court.

4. Question. State the basis for the assessment of $85,876.73 for the income tax liability for Samuel Shapiro for 1971.

4. Answer. This interrogatory is objected to on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information herein sought is irrelevant and immaterial to the matters presently before the Court.

3 5.(a) Question. State when agents of the Internal Revenue Service first learned that Samuel Shapiro would be extradited from the United States.

5.(b) Question. State the name of the agent who received this information and from whom he received it.

5.(c) Question. State the date which was communicated to the Internal Revenue Service as the date for the extradition for Samuel Shapiro.

5. (a), (b), (c) Answer. Special Agent Albert Felberg, the special agent assigned to the investigation of this case, first learned of the existence of deportation and extradition proceedings on October 31, 1973, when he interviewed Mr. William B. Gurock, Acting Chief Trial Attorney, Immigration and Naturalization Service, Department of Justice, at which time he was advised that extradition proceedings had been instituted in the Courts and were presently on appeal, but was not advised that any date for departure had been set. The first time Special Agent Felberg was advised that any date for the plaintiff Samuel Shapiro's, departure had been set was on or

about November 28, 1973, when he interviewed Colonel Moshe Malchi, Counsel of Israel, who advised Special Agent Felberg that the plaintiff, Samuel Shapiro, was due to depart the United States on December 9, 1973. Prior to that date neither Special Agent Felberg nor any other agent working on the ivestigation of Samuel Shapiro's income tax liabilities for the years 1970, 1971 and 1972 had any knowledge of the date of Samuel Shapiro's departure from the United States.

6. Question. State why no effort was made by the Internal Revenue Service to inquire from Mr. Shapiro directly regarding his financial records for 1970 and 1971 before the levying of the jeopardy assessment.

4 5. Answer. This interrogatory is objected to as calling for information which is irrelevant and immaterial to the matters presently before the Court.

7. Question. State what records, if any, of Samuel Shapiro would be relevant and material in establishing whether or not the assessments made on December 6, 1973 are valid.

7. Answer. This interrogatory is objected to on the grounds that the defendant, the Commissioner of Internal Revenue, does not have any present knowledge of what records, if any, that Mr. Shapiro possesses, and thus is not in a position to state which of these records might be relevant and, additionally, objects on the grounds that this interrogatory calls for a legal conclusion.

8.(a) Question. State the date on which the District Director of Internal Revenue approved the issuance of the jeopardy assessment made on December 6, 1973.

8.(b) Question. State the names of the Internal Revenue Service officials who recommended and approved such jeopardy assessment.

8. (a) (b) Answer. The jeopardy assessment was approved on December 6, 1973. The following individuals recommended the making of the jeopardy assessment: Richard Conde, Internal Revenue Agent; Colin McDonald, Assistant Regional Counsel; David Lavin, Review Staff; Harry P. McCall, Chief, Intelligence Division; Domenick Bonanti, Chief, Collection Division; Richard Fogwell, Chief, Audit Division. The jeopardy assessment was approved by George S. Albert, Assistant District Director for Elliott H. Gray, District Director.

5 9. Question. State the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro.

9. Answer. This interrogatory is objected to on the grounds that the statutory notice of deficiency is pursuant to the provisions of Section 6861(b), not required to be sent to the plaintiff, Samuel Shapiro, until February 4, 1974, and does not presently exist, and further objects on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information sought herein is irrelevant and immaterial to the matters presently before the Court.

STEPHEN G. FUERTH,
Trial Attorney,
Tax Division, Department of Justice,
Washington, D.C. 20530.

[Jurat omitted in printing]

1 [Filed December 21, 1973]

In the United States District Court for the District of Columbia

[Title omitted in printing]

SUPPLEMENTAL RESPONSE TO PLAINTIFFS' INTERROGATORIES SERVED ON MONDAY, DECEMBER 17, 1973 PURSUANT TO THE ORDER OF THIS COURT OF DECEMBER 18, 1973 ORDERING THAT ANSWERS OR OBJECTIONS BE GIVEN TO THOSE INTERROGATORIES WHICH THROUGH REASONABLE AND GOOD FAITH EFFORTS THE DEFENDANT, THE COMMISSIONER OF INTERNAL REVENUE, COULD OBTAIN

The defendant, the Commissioner of Internal Revenue, through his attorney, Stephen G. Fuerth, trial attorney, Tax Division, Department of Justice, supplements the answer to interrogatory No. 9 previously given on December 19, 1973.

9. Question. State the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro.

9. Answer. The statutory notice of deficiency was mailed to Samuel Shapiro on December 21, 1973, and a true copy is attached hereto as Exhibit A.

STEPHEN G. FUERTH,
Trial Attorney,
Tax Division, Department of Justice,
Washington, D.C. 20530.

The above statement is true to the best of my knowl-
2 edge and belief based upon conversations with personnel of the District Director's office, Manhattan District, Internal Revenue Service.

STEPHEN G. FUERTH.

[Jurat omitted in printing]

Address any reply to: P.O. Box 3100 Church St. Sta., New York, N.Y. 10008
Department of the Treasury

Internal Revenue Service
Date: DEC 21 1973 In reply refer to: AU:R:900
Tel: 264-3109

Mr. Samuel Shapiro
208 Maple Avenue
Monsey, New York 10952

Dear Sir:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability for the taxable years ended December 31, 1970 and December 31, 1971 discloses deficiencies in tax aggregating $84,506.39, addition to the tax for delinquency under Code section 6651(a) of $1,284.47 for the taxable year ended December 31, 1970, additions to the tax for negligence under Code section 6653(a) of $4,225.33 for the taxable years ended December 31, 1970 and December 31, 1971 and addition to the tax for failure to substantially prepay estimated tax under Code section 6654(a) of $164.42 for the taxable year ended December 31, 1970, as shown in the statement attached.

Assessment of the deficiencies and additions to the tax mentioned has been made under the provisions of the internal revenue laws applicable to jeopardy assessments.

If you decide to contest this determination, you must do so by filing a petition within 90 days (150 days if you are outside the States of the Union and the District of Columbia) from the date of this letter with the Tax Court of the United States in accordance with its rules. A copy of the rules of the Court may be obtained by writing to the Clerk, Tax Court of the United States, Box 70, Washington, D.C. 20044.

Very truly yours,

Donald C. Alexander
Commissioner

By Everett J. Gray
District Director

Enclosure:
Statement

EXHIBIT A

BEST COPY AVAILABLE

STATEMENT OF SAMUEL SHAPIRO, 208 MAPLE AVENUE, MONSEY, NEW YORK 10952

Tax Liability for the Taxable Years Ended December 31, 1970 and December 31, 1971.

INCOME TAX

Taxable year ended	Deficiency	Delinquency addition	Negligence addition	Underestimated addition
December 31, 1970	$5,137.89	$1,284.47	$256.90	$164.42
December 31, 1971	79,368.50	----------	3,968.43	----------
Totals	84,506.39	1,284.47	4,225.33	164.42

The stated deficiencies and additions to the tax are based on adjustments and explanations set forth in detail below.

It is determined that you did not file an income tax return for the taxable year ended December 31, 1970 within the time prescribed by law, nor have you shown that such failure was due to reasonable cause, therefore the 25% addition to the tax provided by section 6651(a) of the Internal Revenue Code of 1954 is asserted for that year.

It is determined that part of the underpayment of tax for the taxable years ended December 31, 1970 and December 31, 1971 is due to negligence or intentional disregard of rules and regulations therefore the 5% addition to the tax provided by section 6653(a) of the Internal Revenue Code of 1954 is asserted for those years.

It is determined that you failed to substantially prepay estimated tax for the taxable year ended December 31, 1970 therefore the addition to the tax provided by section 6654(a) of the Internal Revenue Code of 1954 is asserted for that year.

TAXABLE YEAR ENDED DECEMBER 31, 1970

DETERMINATION OF TAXABLE INCOME AND COMPUTATION OF TAX

Income		$18,000.00
(a) Other income		
Deductions:		
(b) Standard deduction		1,000.00
(c) Exemption	625.00	1,625.00
Taxable income determined		16,375.00
Tax on above		4,599.69
Plus: Self-employment tax		538.20
Corrected income tax liability		5,137.89
Income tax liability disclosed by return		(1)
Deficiency in income tax		5,137.89
Addition to the tax under section 6651(a)—25% of $5,137.89		1,284.47
Addition to the tax under section 6653(a)—5% of $5,137.89		256.90
Addition to the tax under section 6654(a)—See Schedule A		164.42

[1] None filed.

EXPLANATION OF ADJUSTMENTS

(a) It is determined that you realized unreported taxable income from unexplained bank deposits at the 1st National City Bank in the amount of $18,000.00.

(b) You are allowed the standard deduction provided by Code section 141.

(c) You are allowed one exemption, for yourself, as provided by Code section 151.

572-247 O - 75 - 10

TAXABLE YEAR ENDED DECEMBER 31, 1971

ADJUSTMENTS TO INCOME AND COMPUTATION OF TAX

Adjusted gross income disclosed by return	$1,600.00
Increase (decrease) in income:	
(a) Income from illegal activities	137,280.00
(b) Standard deduction	(1,500.00)
(c) Exemption	(675.00)
	135,105.00
Taxable income adjusted	136,705.00
Tax on above	78,783.50
Plus: Self-employment tax	585.00
Corrected income tax liability	79,368.50
Income tax liability disclosed by return	(1)
Deficiency in income tax	79,368.50
Addition to the tax under section 6653(a)—5% of $79,368.50	3,968.43

[1] None.

EXPLANATION OF ADJUSTMENTS

(a) It is determined that you realized unreported taxable income in the amount of $137,280.00 for the taxable year ended December 31, 1971 from your activities as a dealer in narcotics, computed as follows:

Gross income from hashish sales	$381,680.00
Less: Costs	244,400.00
Net income	137,280.00

(b) You are allowed the standard deduction provided by Code section 141.

(c) You are allowed one exemption, for yourself, as provided by Code section 151.

1 [Filed December 21, 1973]

United States District Court for the District of Columbia

[Title omitted in printing]

TRANSCRIPT OF PROCEEDINGS

* * * * *

The above-entitled cause came on for further hearing on Plaintiffs' motion for preliminary injunction and Defendants' motion to dismiss before the Honorable Charles R. Richey, United States District Judge, commencing at 3:00 p.m.

APPEARANCE

On Behalf of the Plaintiffs: HERBERT J. MILLER, JR., Esq., and MARTIN D. MINSKER, Esq.

On Behalf of the Defendants Secretary of State and Acting Attorney General: ROBERT RANKIN, JR., Esq., Assistant United States Attorney, JOHN L. MURPHY, Esq., Chief of Department, Criminal Division, Government Regulations Section, and GIL ZIMMERMAN, Esq., Assistant United States Attorney.

2 On Behalf of the Defendant Commissioner Internal Revenue Service: STEPHEN G. FUERTH, Esq., Tax Division, Department of Justice.

* * * * *

3 PROCEEDINGS

The DEPUTY CLERK. Civil Action Number 2172–73, the case of Shapiro, et al. versus the Secretary of State, et al.

For the Plaintiffs, Mr, Miller and Mr. Minsker; for the Defendants, Mr. Rankin, Mr. Zimmerman, Mr. Fuerth, and Mr. Murphy.

Mr. MILLER. If the Court please, Herbert J. Miller, Jr., appearing for the plaintiff.

Mr. Lewin was unable to be here today because of his religious faith requiring him to be home at sundown.

The COURT. All right.

Mr. LEWIN. He will not be able to make it.

I was down here on another matter so he asked that I fill in for him.

I would also like to suggest to the Court that an answer to an interrogatory was served on Mr. Minsker of our office at approximately 12:20. It's a rather remarkable document. It indicates that Mr. Shapiro derived an income of about $381,000.00 and $680.00 from hashish sales.

The COURT. I have a copy that my law clerk handed to me when I came off the bench, Mr. Miller, and I have read it.

Mr. MILLER. I might say for the record, if the Court please, Mr. Lewin, before he left for home called Mr. Shapiro and was informed by Mr. Shapiro that the charge is false.

And I would only suggest to the Court that if this is a fact, if in fact he did sell hashish in that amount, it would appear to me that the cause of justice is better served not by sending this man out of the country, but by conducting an investigation and returning an indictment in this country.

The COURT. Mr. Rankin, what do you say about that, having come from the former Chief of the Criminal Division of the United States Department of Justice?

Mr. RANKIN. I beg your pardon?

The COURT. What do you say about that, having come from the former head of the Criminal Division of the United States Department of Justice?

Mr. RANKIN. Your Honor, we have consistently argued in this case that this Court lacks jurisdiction.

The COURT. I know you have.

Mr. RANKIN. We have argued throughout that the matter of this tax proceeding is really irrelevant to the case before this Court.

Obviously, we knew of the underlying basis of the tax assessment. It was going on in New York. We didn't know the final figures, the final computations. We were aware of this claim of dealing in hashish.

It was very frustrating not to bring this before the Court, but we were consistently arguing that this Court lacked

jurisdiction and those matters were proper for litigation in the appropriate tax forum at a later time.

This morning, when we learned that this statutory notice had gone out in due course in the proceedings in New York, it was obviously incumbent upon us to advise this Court of that because of the action that this Court was to take this afternoon.

Also, obviously, we could not withhold this information and present it at a later time because we thought it was irrelevant. It was important to the Court so we did.

Your Honor, there was absolutely no deliberate effort on the part of the Government to have this come out this afternoon, obviously. It came out today; when it came to our attention, we brought it before the Court.

We would submit, Your Honor, that this really changes nothing as far as the case which was before this Court except possibly in one way: We have argued that this Court lacks jurisdiction; plaintiff knew that he was going to receive a statutory notice with this explanation in it or with some explanation in it at some time before February 4th; he was going to have to at some time litigate that tax case and attempt to have himself represented properly at that Tax Court.

He has claimed throughout this litigation that by being in Israel, he will not be able to do that. It has been our consistent claim that he can make a due process argument in the course of that tax litigation and that this Court should not interfere with an extradition which is based on a treaty between this Government and a foreign Government.

He has the same right now to litigate in a Tax Court as he would have had had he gotten the notice two weeks from now or February the 4th; so it doesn't really change the situation.

Except, Your Honor, it does assist in the argument to show that this Court should not exercise equity jurisdiction even if it deemed it could consider granting injunctive relief.

We have consistently argued the doctrine of clean hands. The plaintiff, as the Court is well aware, left Israel, where there is an indictment; the Israel Government wants him; he came to this country.

There is the claim now that he has been dealing in hashish and apparently quite a large dealer.

We suggest, Your Honor, that even if the Court felt that it had jurisdiction to grant injunctive relief, that under the doctrine of clean hands, that this Court should certainly abstain from granting any type of injunctive relief.

The COURT. May I ask you one thing before Mr. Miller arises to speak? I want to address a question to you, if I may, Mr. Rankin.

You will recall the other day that Mr. Miller's partner, more or less as a threshold argument, repeated over and over again, arguing that there can be no forfeiture. He argued that this was tantamount to a forfeiture and an extradition at the same time.

And he went on further to say that the Government must choose between one or the other of the remedies even in the particular circumstances of this case.

Now, what do you want to say about that with particular reference to these additional facts, if they are facts, or assertions? Let's put it that way. That's all they are, I think.

Mr. RANKIN. Your Honor, I think . . .

The COURT. The Court has got to consider them as just assertions now.

Mr. RANKIN. Your Honor, we feel that we have shown that the extradition is appropriate, and this Court clearly lacks any jurisdiction to enjoin an extradition; so that's got to go forward.

Mr. Lewin suggested that we should choose and, therefore, if we want to extradite him pursuant to these negotiations with the Government of Israel, we would have to drop the tax assessment.

But, Your Honor, Congress has provided for this statutory type of jeopardy tax assessment. It was done in the normal course. There is a basis for it.

The COURT. Why didn't you tell me the first time you were here that you knew about this so that the plaintiffs could have made at least some sort of response?

Mr. Miller represents to me that he got this at 12:20 this noon. Was that the time?

Mr. MILLER. It was delivered to us at 12:20 this afternoon to Mr. Minsker. I was down at court. I just saw it fifteen minutes ago.

The COURT. I think that is about the time I got it, I think, when I went into my chambers.

Mr. RANKIN. I think you got it—yes, that's correct.

I got it just a short time before that, Your Honor.

The point is . . .

The COURT. But you did know about it, though?

Mr. RANKIN. Your Honor, we were aware that the tax assessment was based on the fact that this man was dealing in hash.

The COURT. Hashish.

Mr. RANKIN. Hashish.

The COURT. Why didn't you indict him then?

Mr. RANKIN. Your Honor, I tried to explain that we have consistently argued that the Court is without jurisdiction on that point and that should come up in the tax litigation.

The procedures under the . . .

The COURT. You mean it's legal to deal in hashish in the United States?

Mr. RANKIN. I am not saying that, Your Honor, and we aren't dealing with a criminal indictment or the possibility of a criminal indictment in this. . . .

The COURT. You're going to let him go?

Mr. RANKIN. Your Honor, the Southern District of New York is where most of this action is going on, and I'm not dealing with these aspects of the case.

The COURT. All right.

Mr. RANKIN. But I would like to point out that the doctrine . . .

The COURT. It goes to the clean hands argument that you've made. That's what you're saying. Is that the thrust of it?

Mr. RANKIN. The thrust of the point, Your Honor, is that we had to inform this Court when it came out.

The COURT. All right.

Mr. RANKIN. This was only a part of an ongoing proceeding under the statute.

Now, you can't say that I.R.S. should have deliberately held out until February 4th. It wasn't for me to tell I.R.S. when to issue this notice. But once it came out, it was our duty to inform this Court. And we say it has no effect on this lawsuit other than to reaffirm our clean hands argument.

The COURT. Okay.

Mr. Miller.

Mr. MILLER. If the Court please, there is an appearance to me of such a basic unfairness with what is transpiring here.

Certainly, I do not have an acute familiarity with all of the facts. But I do know that to be apprised fifteen minutes before a hearing that a client whom I have assumed is a perfectly honorable man has been engaged in hashish sales in the amount of $388,000.00 is a very startling development, particularly in view of the fact that the Government admits that it had knowledge of that before. And if this gentleman didn't, I.R.S. did.

And I think it was incumbant to make that available to the Court and to us for this reason: Remember, this information was supplied in response, as I understand it, to interrogatories that we served.

And what I say is that if this goes to the clean hands argument, as my worthy confrere suggests, then certainly equity requires that we have an opportunity to rebut this evidence and not have it stand in the record.

I know how I would feel if I were the individual who had a document like that filed with no chance—if I am going to be extradited—with no chance to clear the record, with no chance, if you please, to prove my innocence. And to me it is just another example of how the Government has acted in this case.

11 I think that the Government of the United States, no less than individuals, should be required to abide by the agreements with which they have made. And I submit to the Court that from what I've seen of this case, just as an element of equity and basic fairness, that the Government is not treating this man the way it should be.

Now, they have grabbed two remedies. And I submit to the Court, let them have one or the other. But it is so unfair to take this individual and send him off to perhaps a long time in prison in Israel because he is unable to make bond, because the money has been grabbed by the United States when the United States has moved desperately to make sure that there can be an extradition.

And, furthermore, the fact of all of this urgency escapes me, if the Court please. The Government of Israel was willing to wait for the birth of a child and subsequent thereto and arrange for an orderly disposition of the matter. And then, at the last minute, when the man is going to be extradited, we find that a jeopardy assessment is filed against him and now we find that

the jeopardy assessment is based on an alleged narcotics charge, which I, sir, deny to the Court based on what the client told my partner.

And I think at minimum we are entitled to an opportunity to introduce evidence if that's wrong. Because I'll say to the Court as a citizen, not as a lawyer, that if, in fact,

12 this man engaged in this type of transaction, I submit that that man should remain in the United States, should be indicted and tried, and if found guilty, incarcerated, because that is no small potatoes when it comes to the drug traffic. I know that of my personal knowledge.

Mr. Minsker would like to address the Court, Your Honor.

Mr. MINSKER. Your Honor, if the Court would indulge me because I am somewhat more familiar with the jurisdictional or legal argument, I would like to set that out.

Your Honor will recall our complaint states a claim in explicit terms of a deliberate denial of procedural due process in the making of this assessment on the very eve of extradition.

These facts, jurisdictionally and legally, disclosed at the last minute go to the very heart of that point.

Your Honor will recall that we have consistently tried to elicit what the basis, the actual basis, of the jeopardy assessment was. Your Honor will recall that we served an interrogatory to that effect. There was a discussion about the Government's inability under the circumstances, physical time circumstances, to get responses.

We had a little hearing about that. Your Honor directed Mr. Rankin and the Government counsel to do

13 their level best.

The next day—I believe it was approximately at 12:00 o'clock—they served their responses to that interrogatory which with respect to interrogatory number 9, stated—and I don't have the documents they served—I think they said that this information sought is irrelevant and also the notice of deficiency or the information sought doesn't exist at this time. I think they said that the notice doesn't exist at this time.

That was before the hearing on the preliminary injunction.

Then, as Your Honor knows, the matter was decided and was put over for today. Then at the last minute today, they disclosed what is the critical basis of the majority of the jeopardy assessment.

Now, Your Honor will recall that the amount of the assessment, the funds they assessed, they tied up all the funds under security and have been claiming something like $90,000.00. I don't have the figures in front of me.

Most of that is now attributed to this last-minute disclosure.

Your Honor identifies as the critical point the question of forfeiture. There can be no question but that Your Honor could establish a jeopardy asssessment, which was admitted by the United States or the Government, to be without any basis.

Now, we have alleged a deliberate delay or a deliberate
14 combination of extradition and jeopardy assessment procedures in order to prevent Mr. Shapiro to come into court and defend on the jeopardy assessment basis.

It turns out that the critical basis was this business of hash dealing. It is disclosed at the very last minute before we can respond to it in this Court as the basis.

It is no longer a question now under the Enoch case, the Government's proof as to the basis of what they have done has to be taken and has to be assumed by the Court to be correct; the Government has told the Court what the basis of most of the assessment is.

So it is no longer the Enoch question case of should the Government be required to litigate in advance in an injunction action before it gets the tax money what the Congress has said it should be litigated afterward.

The Government has now told the Court what the basis of the assessment was. The telling of it to the Court at the very last minute when the Court is expected to act on the TRO, which if the Court denies and there is no other relief, Mr. Shapiro disappears from the jurisdiction.

It fits right in squarely with the conceptual allegations of all of our complaints. I don't have them all in front of me right now, but it fits right in with the *Phillips* v. *CIR* case; and it fits right in with the language in Enoch and the language in
Nut Margarine, where the Supreme Court said: "In spe-
15 cial and extraordinary circumstances where what the Government has done is an exaction in the guise of a tax," then the tax assessment is no bar to forcing a lifting of the jeopardy assessment.

I am not as experienced . . .

The COURT. What you are really saying is that under those circumstances or similar circumstances, there may be equity

jurisdiction which would permit the Court to issue the injunction you seek.

Mr. MINSKER. Precisely, Your Honor.

The COURT. I know what you're talking about.

Mr. MINSKER. Precisely.

And the Government has itself created the very circumstances by this last-minute disclosure.

If I may try the Court's patience. . . .

The COURT. Let me ask you another question and then you can come back to it.

As I understand this agreement or recall it, the matter of bail was not one of the three items in the agreement between this country and Israel initiated by your good offices through the Embassy here while he went back to Israel and prepared to stand trial there.

Mr. MINSKER. I believe there was. . . .

The COURT. Isn't that specifically correct?

Mr. MINSKER. I believe it is, yes.

16 The COURT. You alluded to it . . .

Mr. MINSKER. Yes, I did.

The COURT. . . . and talked about it . . .

Mr. MINSKER. Right.

The COURT. . . . but it was not a part of a specific agreement.

Mr. MINSKER. I believe the specific agreement was that Mr.—okay, let me read it to you. That's the part that Mr. Lewin is most intimately familiar with, but let me read to you from . . .

The COURT. They think he's okay.

Mr. MINSKER. Pardon?

The COURT. According to the letter, they think he's okay

Mr. MINSKER. That's right.

Let me read to Your Honor from the letter of December 11, 1973, Exhibit 4, page 2: "As reflected to me from the Department of State, dated September 19, 1973, the assurances to Mr. Shapiro by the Government of Israel were the following:

"These are quoted precisely as stated in a letter to me.

"One, that extradition be delayeduntil after the birth of his child, expected to be November, and the religious ceremonies incidental to its birth.

"Two, that Shapiro be allowed to remain at large in
17 Israel until acquittal or conviction.

"And, three, that trial be continued."

Now, I believe what happened—and this should be checked with the pleadings—but I believe what happened is that Mr. Lewin said to the State Department that these are the three conditions; and then Israel said, "Well, we will let him be enlarged provided he makes a bail of 250,000 pounds."

So I would submit to Your Honor that the bail requirement was a specific part of the agreement because the bail requirement was subordinate . . .

The COURT. All right.

Let's assume that that's correct and you've refreshed my recollection, and I think you are correct.

But there was no specific agreement in the $55,000.00 given as security to bondsmen in New York in addition to funds totalling about $35,000.00 in U.S. bank accounts was precisely and specifically agreed to be used for the bail bond in Israel, was it?

Mr. MINSKER. That is correct, Your Honor.

Of course, there was no specific agreement as Your Honor has just spelled it out nor could there be, because there was no inkling on the part of Mr. Shapiro or his counsel that the Government would simultaneously be conducting in secret a tax investigation and there could be no inkling on counsel's part or anybody's part that the money that was going to be used was going to be tied up with a jeopardy assessment.

And, of course, it was known to the Government that this money was tied up under security because it was tied up under securities that the Government suggested.

There was no way that Mr. Lewin could have negotiated for them not to seize that money and take it away when the whole course of the Government's conduct has been such that there wasn't even an inkling or suggestion on the part of the Government that anybody was even investigating or auditing or looking at Mr. Shapiro, much less thinking of tying up the funds.

But Your Honor is correct as Your Honor states the absence of that specific provision from the agreement.

If I may say, Your Honor, our complaint will rest on two grounds. It rests both on the denial of procedural due process by the deliberate calculated seizure and on the denial of due process and the denial of the requirement of fair-dealing and

the Government keeping its agreements as set forth in the Giglio case.

On either ground, if we're correct and if our legal arguments are good as to jurisdiction, we submit we've shown the requisite factual likelihood of success on the merits to be entitled to an order.

We submitted that in papers repeatedly, Your Honor, and I submit what has happened today establishes beyond peradventure that we have had the requisite of likelihood of success of showing an unconstitutional combined use of extradition and jeopardy assessment techniques to get the would-be tax litigator out of the jurisdiction before you bring the assessment.

The Government has—again, I must emphasize that the whole logic—the whole logic of the Enoch case is to say—the whole justification—the whole principle of it is to say—that the reason the tax injunction statute forbids a Court from interfering with the collection of taxes is because otherwise litigants could tie up the Government before it gets the money in litigation.

And Congress has made a judgment: These matters should be litigated subsequently.

So the Court said and it's developed its two-pronged test which fits in with the logic of that approach, saying that you have to assume on the most liberal facts that the Government can make its claim.

But that whole logic falls out when the Government tells you that the basis of the claim is narcotics dealing or hashish. And when they deliberately delay to the last minute, Your Honor, to disclose that so that we can't respond, they've in effect, committed—they've, in effect, done it again. They've, in effect, used the procedures of this Court, as it were, in combination with jeopardy assessment and the extradition proceedings to get the property and get the man out of the jurisdiction.

They're delayed until the last minute. It seems to be fairly apparent from the admissions of knowledge that that delay was a knowing delay to tell us what the basis of the jeopardy assessment was.

Now, we can't respond to that basis. Were the order not granted, he'd disappear from the jurisdiction tomorrow.

In a sense, not only does it establish the requisite facts necessary to put this case squarely within the Nut Margarine language of an exaction in the guise of a tax, but it almost establishes it on an independent basis which could be set out in an amended complaint asking for declaratory injunctive relief, although, obviously, we don't have time to write that and file it.

At one point in one of the pleadings we filed we said, "What does it mean to tax in the United States of America under the Constitution and laws of our Country?"

And, to me, what the words "to tax" mean, in light of the principles of procedural due process, the time-honored principle of procedural due process which are the very pillar of an organized and orderly society, the words "to tax" mean to me the Government shall take the property of a citizen under claim of right with adequate opportunity at some stage for the citizen to contest the claim.

21 Those are what the words "to tax" mean in the entire fabric of our constitutional and statutory law.

What has the Government done here? Has it taxed or has it done something else?

It has seized the property in a fashion and in a manner calculated to and which, in effect, does foreclose the taxpayer from contesting the claim of right of the Government of the United States.

I do not understand what it can mean in the language of the Supreme Court of the United States nor in the language of the Constitution of the United States. I don't understand what it can mean to say, "You've done something which is an exaction in the guise of a tax." if it doesn't mean the conduct which has been engaged in in this case.

The Government has not taxed this man when they put that jeopardy assessment in force; it exacted; it seized; it forfeited in the guise of a tax.

If the Court has no more questions of me, I'll take my seat.

The COURT. Mr. Fuerth, would you like to add something?

Mr. FUERTH. Your Honor, I would just like to respond on behalf of the Commissioner of Internal Revenue.

The COURT. All right.

Mr. ZIMMERMAN. And I would like to advise the
22 Court with respect to an aspect of the clean hands doctrine which I believe has not been touched upon.

The COURT. All right.

But if you say anything new, I am going to give the other side a chance to respond.

Mr. FUERTH. Well, Your Honor, I merely want to say that I deeply resent the implications that there was any deliberate delay or fact-hiding from this Court.

It was our position then, at the time that this action was instituted, and our position is now that this Court lacks the necessary jurisdiction that's been spelled out to go into the tax liability.

That is the reason we didn't bring it before this Court. That is the reason we didn't mention it.

But the Service, the Internal Revenue Service, was in due course and, rather than delaying, with utmost speed working on this matter and was preparing—was preparing the statutory notice which, after all, all that document is is a ticket to the Tax Court. That merely provides an entry into the Tax Court.

And rather than sitting on its hands and delaying and holding this thing back until February 4th, which it would have done by right, it attempted to work as fast as possible.

And it was just by happenstance that it happened that it was going to come out today. Just that.

23 Now, I could have just as easily told the Service, "It's going to upset the applecart if the statutory notice were to be issued today. Hold up."

But I felt that that would have been inappropriate for me to meddle in their affairs. I deliberately allowed them to go along in a normal procedure as they would have treated any other taxpayer.

When I learned that the statutory notice was going to come out today, not in any effort to influence this Court and not in any effort to prejudice anyone, but in the effort of fairness, I felt it was my duty to reveal it to this Court.

The COURT. I'm glad you did it.

Mr. FUERTH. I felt that if the taxer has received it on Tuesday and I had presented it to Your Honor then, Your Honor would have been quite justifiably upset with us if we had not brought it to Your Honor's attention as soon as we knew about it.

But there has never been any attempt on this part of the Government to hide anything from you, and I resent that. Your

Honor, the implication that we were deliberately holding things back.

It is our position that it is not in this Court the question of the taxpayer's liability is to be litigated. It is our position that it is to be litigated in a refund suit or in a Tax Court, which, I might add, now that the statutory notice has been issued, there is no longer a remedy in the future.

In other words, we are no longer talking of a situation where the taxer has to wait. He can walk in on Wednesday morning and file a petition with the U.S. Tax Court.

The COURT. Couldn't he come into this Court, too?

Mr. FUERTH. No, I . . .

The COURT. Don't we have concurrent jurisdiction on a suit for refund?

Mr. FUERTH. Only if he pays the tax in full, waits the necessary six months, if the claim is rejected; from that day on can he sue. So there would be a longer period of time.

And I might add it would not be this Court, in any event, that he would come in. If he still resides in New York in the Southern District, it would be that Court that he could go into or in the Court of Claims.

But in no event would the question of the tax liability be litigated in this Court.

The COURT. Because of his residence?

Mr. FUERTH. Pardon?

The COURT. Because of his residence?

Mr. FUERTH. Because of his residence, yes, Your Honor.

The COURT. All right.

Mr. FUERTH. Thank you.

The COURT. Mr. Zimmerman.

Mr. ZIMMERMAN. Gil Zimmerman, Assistant United States Attorney.

Mr. Rankin came in to discuss with me the clean hands problem this afternoon relating to me the latest occurrence, which has been brought to the Court's attention.

Rather than burden him to be the intermediary to convey what I am about to say to the Court, I told him I would accompany him and address the Court directly. And I thank the Court for the opportunity to be able to address the Court.

The essential element of the clean hands doctrine is not the other fellow's bad conduct. It's the man who is coming into Court to seek relief.

And as Your Honor may recall the maxim: "Equity leads a fellow who makes his bed where he finds it."

That's not the appropriate exact wording, but you recall the maxim.

I handled the case of a DeGaster versus Fowler, Your Honor, on behalf of the United States. Judge Jones in that case, in an opinion rendered at 247 Fed. Sup. 511, applied the proposition that the Court on its own, sua sponte, in the interest of its administration of its own affairs, will not interfere on someone to whom the clean hands doctrine applies.

And at page 518, said: "Moreover, by applying the equitable clean hands maxim here and thus denying the plaintiffs the equitable relief they seek, this Court does not declare, forfeit, or address the merits of the proposition," or anything else. It simply closes its door.

"This Court simply shuts its door to the plaintiffs by refusing to interfere on behalf of them to acknowledge their rights, if any, and to award them any remedy," citing the Supreme Court cases that are pertinent.

And that decision, Your Honor, was affirmed by the Court of Appeals reported at 354 Fed. Second 515, per curia, on the statement that "this Court being in general agreement with the excellent opinion filed by the District Court in the case."

In other words, because of the fraud or the element of bad faith on the part of the plaintiff, the Court simply said, "I will not entertain you."

What do we have here? The Government's statement of facts indicates that there is a man wanted in Israel for a number of . . .

The COURT. I know that.

Mr. ZIMMERMAN. Very well.

He is an alien illegally in this country. He has violated the laws of this country to come here. The Government of Israel has asked for his extradition. He has an absolute remedy to go in and defend on that tax case.

If the Government cannot make out a case there, there is no forfeiture. That's a ridiculous argument.

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So all I can say, Your Honor, is look at it. The Government claims that here is a man doing wrongdoing in this country. The State of Israel wants him for wrongdoing in that country. And he is an alien illegally in this country.

It seems to me an equity court should close its doors exactly as Judge Jones did in that case.

The COURT. Mr. Miller.

Mr. MILLER. If the Court please, I am informed that my partner, Mr. Lewin, has responded to each and every one of those statements. I would add but one thing.

If the Court of the United States can accept unsupported allegations as fact upon which to base a determination of lack of clean hands, then I think that the due process clause of the United States has gone by the boards.

And I submit to this Court that we have an allegation that the man is wanted in Israel may be an indictment. I assume that does not mean he's guilty.

We have an allegation that he sold hashish. That does not prove to me that he did.

And I submit to the Court that it would make a mockery of the judicial process to take that unsupported hearsay comment coming in at the last minute and say that ruins or denies or takes the clean hands doctrine out of the case.

And I submit that argument isn't worth anything.

And I think that if the Court will look precisely what the Government has done in this case to this individual—I mean it's all well and good when the Commissioner of Internal Revenue can come on and state what this part of the Government is doing and another lawyer to come and state what this part of the Government is doing—what we are requesting the Court is to see what the United States of America is doing in this case as one Government.

Thank you.

The COURT. All right, gentlemen.

I told all of the parties that the Court would rule today at 3:00 o'clock. Obviously, of course, in view of this eleventh-hour development, it was only fitting and proper, in the opinion of the Court, to permit both sides to give the Court the benefit of additional argument.

I will say too, Mr. Miller, by way of an aside, although it doesn't make any difference one way or the other, it looks to me that you have been a little outnumbered today in terms of

manpower. Each time the Court has had a hearing on this, we have had one more counsel either at the table or in the courtroom.

In any event, the Court has very carefully considered the final pleadings that have been drawn by counsel for both parties. I hope that the lawyers, at least those on the plaintiffs' side, have been paid by the word as they used to be in England, because they have been under very difficult circumstances and have done a lot of hard work.

Now, to get down to the ruling of the Court: The Court did issue a temporary restraining order on December the 14th and then extended that again by agreement of the parties until today at which time it was understood that the Court would rule on the application of the plaintiffs for a preliminary injunction.

In dealing with this matter, the Court must first address itself it seems to the question of jurisdiction which has been raised by the Government. They first contend that the Court lacks jurisdiction to enjoin the execution of a warrant of extradition which has been duly issued and, in effect, approved by the United States District Court for the Southern District of New York in the Second Circuit.

And the Court, after careful study and with some reluctance, I might add, finds it necessary to agree with that conclusion.

It will add that it has come to this conclusion, not only with reluctance, but with some difficulty. Were it not for the fact that a sister Judge had made this decision and the appellate process had been exhausted and that this had been done in another District pursuant to an international treaty, or a treaty between the United States and Israel, the result here might well have been different.

The second contention with respect to jurisdiction is that the Court lacks jurisdiction over the U.S. Marshal for the Southern District; and I think on its face, consistent with what the Court has previously said, that that is also true and the Court so holds.

In addition, the Government contends that this is an unconsented suit against the United States and, therefore, it lacks jurisdiction on that ground also and that it can't grant injunctive relief against I.R.S. jeopardy assessments and that there has been no denial of due process within the meaning of the exception set forth in the case of

Enoch versus Williams Packing Company, decided by the Supreme Court of the United States in 1962. If I recall, the Chief Justice of the United States wrote that opinion—the former Chief Justice, Mr. Justice Warren.

I want to say here and now, in view of what the Court has learned today, that the Government was aware from the time this suit was filed and prior thereto, that there was a claim for these back taxes based on illegal trafficking in narcotic drugs, in this case hashish.

For the like of me, I cannot understand why that was not made known, although perhaps the Government was under no obligation to do so.

What, in effect, the plaintiff appears to be saying is set forth in a memorandum entitled "Opposition to Motion for Preliminary Injunction."

And I quote: "Not to avoid trial in Israel, but to be free on bail in Israel while he contests the charges there lodged against him."

Now, while that may have been an implicit understanding on the part of the plaintiffs, particularly the main plaintiff, that he would be guaranteed bail in Israel, there was never any agreement that the bail money that would be posted
32 in Israel during the time of the proceedings against him there would come from the monies that were seized in the United States in the amount of approximately fifty-five thousand dollars.

I think upon careful consideration, upon all the facts in the entire record, that this case does not amount to a violation of due process. It does not fly in the face of the Enoch standard as claimed by able counsel for the plaintiff.

The Court, as it has previously said, has before it an uncontested order of extradition. And following the entry of that order, which was approved by the Second Circuit, this jeopardy assessment was levied.

While the Government would preferably have made known the basis for its claim, I don't think that it is necessarily fatal or tantamount to a denial of due process for its failure to disclose such a basis for its assessment before now or until February 4th, at least.

So we come down to the fundamental question, as the Court has indicated, as to whether the Court has jurisdiction; and the Court finds that it does not.

As to the due process claim of the plaintiffs, the Court will say this: The standard is whether the Government has a chance of ultimately prevailing on the basis of the information available to it and available to the Court. And only if it is apparent under the most liberal view of the law and the facts that the United States cannot establish its claim, may a suit for
33 an injunction be maintained.

Now, that is a principle of law laid down in Enoch; and I just don't find and cannot find, as much as I really do not like the activity of the Government in this case—I will tell you frankly I don't, because I think this could have been at least disclosed at the time or some opposition be made before this man's departure—but, nevertheless, looking at it from the most liberal point of view and in the most liberal light as to the law and facts in favor of the plaintiff, I don't see how the Government can fail to establish its claim; and I think the suit for injunction and the other relief must be denied.

That means that the Court is without jurisdiction, and the preliminary injunction will be denied.

I do not feel and find that there is a likelihood that the plaintiffs will be able to prevail on the ultimate merits. I don't think the public interest will be served by the granting of the injunction.

As to the question of irreparable injury, sure, the male plaintiff will be in Israel and defending himself there against a criminal charge, according to the record in this case; but he can file a petition with the Tax Court, and he has that remedy.

So for all of those reasons, I think, as I said, with some reluctance, this doesn't come with the exception of the
34 Enoch case, and the Court lacks jurisdiction.

The test that is set forth in the Virginia Jobbers case has not been met; and the Court, accordingly, for all of the reasons given will deny the motion for preliminary injunction and grant the Government's motion to dismiss.

If the Government will present an appropriate order, the Court will entertain it.

Mr. MILLER. May I approach the bench, Your Honor?

The COURT. You surely may.

Mr. MILLER. The lecturn is what I mean.

If the Court please, in view of the time situation we find ourselves in—we are now late Friday afternoon; the client and his lawyer both are of the same faith and both are confined to

their homes from sundown to sundown; I understand that we are now entering the holiday period—I know we are—I would request that the Court . . .

The COURT. I can assure you, Mr. Miller, I have not. I have been very busy and I think you probably have, too.

Mr. MILLER. If the Court pleases, this is the holiday season, deliver me from it. It seems to save all up for December.

But if the Court please, I would like to move that the action of the United States in this case be stayed until noon . . .

The COURT. You mean the decision of the Court.

Mr. MILLER. Pardon?

35 The COURT. You are asking that the decision of the Court be stayed.

Mr. MILLER. Yes, I am asking that the stay against the Government be continued to enable us to file a notice of appeal and seek a stay from the Court of Appeals.

And, if the Court please, it would be impossible, obviously, to do it before Tuesday. We could get it in by Tuesday; but I know the Court of Appeals normally requests that they be given a couple of days leeway; and I don't see that any injury to the United States because they have the man and they have his money.

So if the Court would entertain this motion to stay the Government action in this case until noon a week from Friday—I don't know what the date is . . .

The COURT. That's the 28th.

Mr. MILLER. The 28th.

The COURT. Friday is the 28th, a week from today.

Mr. MILLER. And we will undertake—obviously, prior to that time—to file a notice of appeal and seek to obtain a stay in the Court of Appeals continuing beyond that date, Your Honor.

The COURT. Any objection, gentlemen?

Mr. RANKIN. Your Honor, the Government strongly opposes the motion for a stay. This Court has already found it lacks jurisdiction in the case, and we submit it lacks

36 jurisdiction to grant a stay here.

Plaintiffs' remedy is obviously in the Court of Appeals; and there is a procedure for getting there, and they can get there today. And there is no need for a stay from this Court.

The COURT. Let me ask you this, Mr. Rankin: In all candor, you are within your perfect right to say that. I agree with you—I don't think this Court has jurisdiction either.

But that doesn't necessarily mean that I don't have jurisdiction to stay the effect of my order so that the plaintiff can have the opportunity, at least, for appellate review.

How does that follow?

Mr. RANKIN. We submit that plaintiff has an opportunity to get appellate review without a stay order from this Court.

The COURT. It's even less than about 12 or 13 minutes to 4:00, and I doubt if there is an Appellate Judge in this building. I may be totally in error.

The Clerk's Office and our Court's office, everybody's gone.

I just don't want the Court or the Government to be heavy-handed about this or to do anything that would legitimatize the claim of being heavy-handed.

I feel confident that what I've done here is absolutely

37 right. But what harm is going to come except that maybe you will have to write a brief—but you've already got that done—in the Court of Appeals, depending on the decision of this Court, for one more week? And you can do it on an expedited basis.

Mr. RANKIN. Your Honor, . . .

The COURT. This isn't something that the Court of Appeals will drag out. I am sure they won't. They can be made to realize, because there is an element in this case that I didn't mention but I am sure you're aware of; There is a delicate element of international relations that's involved here; and it's a duty of this Government and an obligation of this Government to uphold the dignity of its treaty.

And unless you can show me that this is going to substantially and irreparably damage the relationship between the United States and Israel by virtue of that treaty, I think that the interest of justice requires the Court of Appeals to be given an opportunity to review this.

I don't think they'll take much time or need much time to do this, but . . .

Mr. RANKIN. Your Honor, if I may just address myself briefly to that.

The COURT. Surely.

Mr. RANKIN. As the Court knows; we are fully aware of the sensitive nature of this case. And we saw fit to ex-

38 pedite responding to the preliminary injunction motion, which was not even before the Court, on an expedited

basis of five days, including a weekend, and overnight responded the best we could to interrogatories.

And we submit, Your Honor, that a stay, when this Court has already found jurisdiction, to a week from . . .

The COURT. Lack. A lack of jurisdiction.

Mr. RANKIN. Found that it lacked jurisdiction.

. . . to a week from today, flies in the face of the fact that this Court has held that it lacks jurisdiction and the sensitive nature of the dealings that we are faced with here.

And we submit to Your Honor that the stay should not be granted, but certainly no stay for a week for this order.

The COURT. I will tell you what I am going to do, Mr. Rankin.

Mr. MINSKER. Your Honor, may I be heard?

The COURT. No, just be quiet and calm.

I'll tell you what I'm going to do: I am still trying to get out some other work.

I am going to let you go right upstairs to the Court of Appeals right now, and let Mr. Miller make application to them; and you can make application to them if you can find anybody there.

If nobody is there, I will stay my order until the
39 earliest possible moment, which will be no later than Wednesday of next week. I think then you can get a motions clerk or a motions panel on duty.

But I think in order to avoid being heavy-handed and in order to expedite it, I will stay my order until the day after Christmas, on the 26th, unless the Court of Appeals directs otherwise.

You can have the record. I don't know if everything is in the jacket or not. But you can go up there and let me know if they can entertain your motion between now and the 26th or not and what their feelings are about it. I doubt if you will find anybody there.

Mr. MINSKER. Your Honor, I know this is extraordinary and I hate to interrupt.

But there has been a representation that you lack jurisdiction . . .

The COURT. I have already ruled and we'll have no re-argument.

Mr. MINSKER. No, no, no. I mean on granting the stay, Your Honor. That's the only point.

I have a citation that states that when you deny a temporary restraining order, you still have jurisdiction to stay it . . .

The COURT. I understand that.

Mr. MINSKER. It's established in Moore's Federal
40 Practice in the case of *McBride* v. *Western Union*.

The COURT. I understand that.

Mr. MINSKER. Okay. Thank you.

The COURT. I realize you have worked so hard on this case and you're all wrought up in it.

Mr. MINSKER. Thank you.

The COURT. I've been in your shoes myself many times.

Mr. RANKIN. Your Honor, we did submit an appropriate order with our motions papers.

The COURT. Yes, you did.

Mr. RANKIN. And if the Court could examine that to see if it deems it appropriate.

[The Court examines the order.]

The COURT. I'll tell you what I'm going to do. I think the order that the Government submitted is proper.

Part of these papers are mine, and part of them belong to the clerk's file. I'm going to take them back and get my law clerk to straighten them out for me, what belongs to the Court and what belongs to the clerk. And you gentlemen in the meantime can run up to the Court of Appeals, and I'll sign the order.

I will be back in my chambers.

Mr. RANKIN. Your Honor, I would just like to request an expedited copy of the transcript, an immediate copy, if
41 possible.

Mr. MINSKER. We would want the whole opinion, not just the order.

Mr. ZIMMERMAN. If the Court please, just a note of inquiry: Is the Government stayed until the 26th, and we are not to go to the Court of Appeals?

The COURT. No, it's what I said to Mr. Miller, and perhaps it wasn't clear.

You asked for a stay until the 28th.

Mr. MILLER. Right.

The COURT. I said, "You go upstairs to the Court of Appeals in view of their vigorous objection."

I know I've got authority to stay my own order. They know that's elemental, even in the light of my finding of a lack of jurisdiction.

And I want you to find out if you can get a hearing by the 26th. I just don't know whether any Judge is going to be there next week. That's the problem.

If somebody is there now, so much the better. You can argue it today.

This hasn't been that long. They only need my opinion, and then you can find out. Go to the clerk's office and see who is up there; and let's get it expedited and get the review done.

In the meanwhile, I'll get the record together here.

42 Mr. ZIMMERMAN. We will return to your chambers very quickly, I am sure.

The COURT. All right.

[Thereupon, the above-entitled matter was concluded at 3:55 p.m.]

[Jurat omitted in printing]

[Filed January 3, 1974]

United States Tax Court

[Title omitted in printing]

PETITION

Samuel Shapiro hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue of his notice of deficiency dated December 21, 1973, and, as a basis of this proceeding, alleges as follows:

1. The petitioner is a citizen of Israel with legal residence in Monsey, New York 10952. His income-tax return for the calendar year 1971 was filed with the District Director of Internal Revenue for the District of New York, at New York, New York. No return was filed for the calendar year 1970.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A", was served on counsel for the petitioner on December 21, 1973. It was received by petitioner on December 26, 1973.

3. The Commissioner determined a deficiency in income tax for the calendar years 1970 and 1971 in the total amount of $90,180.61, all of which is in controversy.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that the petitioner realized unreported taxable income by an unexplained bank deposit at the First National City Bank in 1970 in the amount of $18,000.

(b) The Commissioner erred in determining that the petitioner realized unreported taxable income in the amount of $137,280 in 1971 "as a dealer in narcotics."

5. The facts upon which the petitioner relies as the basis of his case are as follows:

(a) The deposit in the amount of $18,000 was money that petitioner had brought with him to the United States from

Switzerland. It was deposited by him at the First National City Bank in order to enable him to issue a check on December 21, 1970, to Keren Eretz Israel Shel Hamizrachi in repayment of a loan in that amount made to him while he lived in Israel.

(b) Petitioner was not a dealer in narcotics in 1971 and did not realize the income stated in the notice of deficiency from any such activities.

(c) Petitioner lived in the United States between 1970 and 1973 on funds which he had earned prior to his arrival in the United States and which were kept for him in Switzerland and were brought to the United States for his use from time to time.

(d) The determination of the Commissioner set forth in Exhibit "A", attached hereto, is arbitrary and discriminatory, is not based on true facts and is erroneous.

Wherefore, petitioner prays that this Court hear this proceeding and:

1. Determine that the Commissioner erred as alleged in each assignment of error set forth in paragraph 4 above;

2. Find that there is no deficiency in income tax for the calendar years 1970 and 1971; and

3. Grant such other and further relief as may be proper in the premises.

RAYMOND G. LARROCA
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street NW., Suite 500,
Washington, D.C. 20036 (202) 293–6400.
Counsel for Petitioner.

[Jurat omitted in printing]

Supreme Court of the United States

No. 74–744

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL SHAPIRO, ET AL

Order Allowing Certiorari. Filed February 18, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

○

Supreme Court, U. S.
FILED
JAN 16 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-744

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

SAMUEL SHAPIRO and BELLA SHAPIRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Nathan Lewin, Esquire
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W., Suite 500
Washington, D.C. 20036

Attorney for Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT	4
CONCLUSION	8
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	3a

TABLE OF AUTHORITIES

Cases:

Alexander v. "Americans United," Inc.,
94 S.Ct. 2053 4

Bob Jones University v. Simon,
94 S.Ct. 2038 4

Lucia v. United States,
474 F.2d 565 (5th Cir. 1973) (*en banc*) 3, 4, 5, 7

Pizzarello v. United States,
408 F.2d 579 (2d Cir. 1969) 3, 4, 5, 7

Sherman v. Nash,
488 F.2d 1081 (1973) 5

	Page
United States v. American Friends Service Committee, No. 73-1791	4
Willits v. Richardson, 497 F.2d 240 (5th Cir. 1974)	5

Statutes and Rules:

IRC §7421	4
IRC §7421(a)	1

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether Section 7421(a) of the Internal Revenue Code authorizes the Internal Revenue Service to seize all of a taxpayer's assets in the United States, without prior notice and demand, one business day before he is extradited to a foreign country and then to refuse to provide to a district court the minimal factual support needed to demonstrate that the seizure, based on a jeopardy assessment, was not arbitrary and capricious.

STATEMENT

On Sunday, December 9, 1973, respondent Samuel Shapiro was scheduled to leave the United States – presumably forever – pursuant to an agreement under which he had withdrawn his challenge in this Court to the validity of an extradition request by the Government of Israel. During his stay in the United States of more than three years, there had never once been the slightest suggestion to him by IRS officials that his tax returns were not in complete order. Yet on the afternoon of Thursday, December 6, 1973, the IRS, without any notice or demand for payment from Shapiro (and, indeed, in a manner which appeared to be designed to keep the information from him until after he had departed the United States) served levies on banks holding his funds pursuant to a jeopardy assessment. More than two weeks later – after respondent instituted the present action in the district court and obtained a court directive that interrogatories be answered – the IRS first disclosed to the respondent that it was making this claim because it believed him to be "a dealer in narcotics." Respondent unequivocally denied the allegation in a Tax Court petition as well as in an affidavit filed some time later in the district court.

Since all his funds were tied up by these levies, respondent feared that he would be unable to raise the funds needed for bail and would be jailed in Israel if he returned there. This action sought the lifting of the levies and the jeopardy assessment on the ground that they were totally without basis in fact. The complaint alleged that respondent would suffer irreparable harm if he were jailed in Israel or if he were unable to be in the United

States to challenge the validity of the jeopardy assessment. The district court granted the government's motion to dismiss. But the court of appeals reversed that judgment. Relying on decisions of the Fifth and Second Circuits in *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973) (*en banc*) and *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969), the court below held that the respondent was entitled to engage in discovery to determine whether the assessment was arbitrary and capricious, that the distirct court might compel the IRS to provide some factual support for the tax claim, and that the assessment and levies could be enjoined if they were "so arbitrary and excessive as to be an exaction in the guise of a tax." That decision is here under review.

Most of the Petitioner's Statement (Pet. 5-9) is devoted to a recitation of what happened in the district court *after* remand by the court of appeals. These events, we submit, are not strictly relevant to the validity of the decision for which review is sought. One reason why they are even available at this juncture for inclusion in the petition is the extraordinarily dilatory tactics engaged in by the IRS since the May 15 decision of the court of appeals. By filing a petition for rehearing and seeking stays in the court of appeals and in the district court, and by obtaining a full 60-day extension of the time to petition for certiorari, the IRS has already managed to keep Mr. Shapiro's assets frozen far beyond the time needed for even leisurely judicial examination. The present petition extends the delay even further. As a result of the government's filing this petition, the IRS has obtained from the court of appeals a stay of the proceedings (See Appendix

1a, *infra*), thereby preventing the discovery process ordered by the district court from going forward.[1]

ARGUMENT

1. The Solicitor General asserts that the respondent's suit violates the Anti-Injunction Act, Section 7421 of the Internal Revenue Code, which bars any "suit for the purpose of restraining the assessment or collection of any tax." But respondent's contention – as the court of appeals properly observed – was that the IRS was not engaged in tax-collection when it seized his property, but only in obtaining "an exaction in the guise of a tax." This is a critical distinguishing feature between this case (along with *Lucia* and *Pizzarello*) on the one hand, and this Court's recent decisions regarding suits by tax-exempt organizations. In *Bob Jones University v. Simon*, 94 S.Ct. 2038, *Alexander v. "Americans United," Inc.*, 94 S.Ct. 2053, and *United States v. American Friends Service Committee*, No. 73-1791, decided October 29, 1974, the judicial relief requested was an injunction against collection of taxes from organizations which had previously enjoyed exempt status. No one claimed that the funds to be collected were not taxes; the only issue was the motive for

[1] The petition implies that on remand the district court was about to rule that the IRS' showing was insufficient and that the assessment was, therefore, invalid (Pet. 8-9). This demonstrates the danger of relying on proceedings that occurred *after* the decision sought to be reviewed as a basis for deciding whether review should be granted. In fact, the district court, on December 18, 1974, issued an order directing an accelerated discovery schedule (Appendix, pp. 3a-4a), and did not invalidate the assessment. What the court would do if no other information is produced by either side is presently uncertain.

which IRS was seeking such collection. As to that, the Court applied Section 7421. But when the purported unilateral and *ex parte* "assessment" or "collection" is not an action that places a taxpayer on a par with all others, but is a seizure of all or a substantial portion of his assets, it is questionable – if not plainly unconstitutional – to say that he has no remedy whatever, but must sit by while his Tax Court case winds it way through the administrative tribunal.[2]

2. The position taken by the court of appeals is consistent with that taken by two other circuits which have recently considered similar abuses by the IRS in using its extraordinary "jeopardy assessment" power as part of the IRS drive against those it believes guilty of narcotics or gambling violations.[3] Interestingly enough, while the

[2] Respondent in this case filed a Tax Court petition within two weeks of service on him of the deficiency notice. Rather than expediting its response to resolve the underlying question whether Mr. Shapiro was a narcotics dealer while he was still in the United States and able to defend himself, the IRS took 30 days to file a one-page answer to his petition. Thereafter, respondent sought an immediate trial in the Tax Court, again hoping to confront his accusers before he was expelled from the United States. *The IRS objected*, and a trial date was deferred until after the summer of 1974. By that time, the decision below had been announced and the respondent had been extradited. Pleadings are now being filed in the Tax Court to consider how to deal with a case involving such an allegation of criminality in the forced absence of the taxpayer, although the situation would not have arisen if the IRS had been willing to expedite a trial.

[3] *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969); *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973); see also *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974); *Sherman v. Nash*, 488 F.2d 1081 (3rd Cir. 1973).

Solicitor General asserts that the decision below conflicts with this Court's rulings regarding tax exempt organizations, the government's brief cannot cite a single case by a court of appeals in the area of jeopardy assessments which sustains its sweeping position that what IRS does when it seizes all a taxpayer's assets on the basis of a unilateral determination of illegal activity is totally immune from judicial examination. Such a proposition jeopardizes the security of all Americans; it places their property entirely at the mercy of an IRS bureaucrat who need only secure the approval of a higher-up for his unsubstantiated allegations to effect a total confiscation of a citizen's assets.

To say, as the government has been saying throughout this litigation, that a taxpayer may pursue his remedy in the Tax Court is to remit him to extended trial procedures – not subject to expedition even in emergency situations (see note 2, *supra*) – while his assets are taken and held by the IRS. The difficulties of finding lawyers when a taxpayer has no money to pay them and of enduring a time when all one's assets are frozen make this a situation where both liberty and property are being denied without due process of law. And when, as is true here, the taxpayer is not even permitted to be in the United States to challenge the criminal allegations made against him and the deprivation of his property raises the possibility that he will be imprisoned abroad, some form of judicial relief is required.

The Solicitor General simply misstates the holding of the court below when he says that the court required the IRS "to prove the facts upon which a tax assessment is based" (Pet. 2). The burden of proof, even on the most favorable reading of the decision below, remains on the

taxpayer. But once he denies the alleged illegal activity, as respondent did here, the IRS must come forward with *some* "factual support" for its assessment. In both *Pizzarello* and *Lucia*, it was conceded that the taxpayer had engaged in illegal gambling; the only issue was whether a "projection" of gambling revenues was arbitrary. In this case, there is no concession of illegality whatever, and at least the same problem exists with respect to any "projection" as existed in *Pizzarello* and *Lucia*. Indeed, this Court could probably take judicial notice of the fact that a gambling operation is more likely to be a continuing business returning constant weekly revenues than is the sale of narcotics. The distinctions between this case and *Pizzarello-Lucia* all establish that the decision below follows, *a fortiori*, from those in *Lucia* and *Pizzarello;* the Solicitor General's attempted distinctions are unsound on their face (Pet. 13-14).

3. Finally, we think a practical consideration is in order in determining whether to grant the Commissioner's petition. The decision was rendered on May 14, 1974, and a delay of more than two months resulted from the filing of a petition for rehearing. Still, had the Solicitor General filed his petition for certiorari by October 15, 1974, this case could be heard and decided (if certiorari were granted) during the current Term. As a result of extraordinary delay by the government, the petition was not filed until seven months after the decision came down, and the result is that even if certiorari is now granted, the case cannot be heard until the 1975 Term. During all this time, respondent's funds will be tied up, if not depleted, by attorneys' fees in the Tax Court action and in this

suit.[4] Thus, even if the government loses this battle, it will win the war by proving to taxpayers that a challenge to a jeopardy assessment is so expensive, time-consuming, and aggravating that it is not worth the effort. That, we submit, is not what vindication of legal rights is about.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Nathan Lewin
MILLER, CASSIDY, LARROCA
& LEWIN
1320 19th Street, N.W.
Washington, D.C. 20036
Attorney for Respondents

---

[4] The amount seized totals approximately $55,000 and a real property levy was filed on a home owned jointly by Mr. & Mrs. Shapiro. During the hearing before Judge Richey on November 12, 1974, respondents' counsel introduced outstanding bills approximating $30,000.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2260 **September Term, 1974**

Civil Action 2172-73

Samuel Shapiro
Bella Shapiro,
Appellants

v.

Secretary of State, *et al.*

Before: Fahy, Senior Circuit Judge; Levanthal and Robinson, Circuit Judges

ORDER

The Clerk is directed to file appellees' for stay of proceedings in the District Court, and on consideration thereof, it is

ORDERED by the Court that appellees' aforesaid motion for stay is granted.

The Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court as promptly as the business of his office permits.

Per Curiam

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2260 **September Term, 1974**
Civil Action 2172-73

Samuel Shapiro
Bella Shapiro,
Appellants

v.

Secretary of State, *et al.*

Before: Fahy, Senior Circuit Judge; Levanthal and Robinson, Circuit Judges

ORDER

IT IS ORDERED by the Court, *sua sponte*, that the Clerk of the District Court is directed to return the certified copy of this Court's judgment forthwith.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL SHAPIRO, *et al.*, *Plaintiffs*,
v.
SECRETARY OF STATE, *et al.*, *Defendants*.

Civil Action No. 2172-73

ORDER

Upon consideration by this Court of the factual submission submitted by the defendants in response to this Court's order of October 25, 1974, and of the arguments of counsel and evidentiary submissions made during a hearing held on November 12, 1974, and of the defendants' "Response to Court Inquiry" filed on November 18, 1974, and for the reasons set forth in the oral opinion of this Court rendered on December 17, 1974, it is by this Court, this 18th day of December, 1974

ORDERED AND DECREED:

1. That the parties be permitted to engage in pretrial discovery as provided in the Federal Rules of Civil Procedure, such discovery to end not later than Jaunary 31, 1975;

2. That, pursuant to the agreement of the attorneys for the defendants in open court on December 17, 1974, the defendants shall respond not later than 10 days after

APPENDIX C

receipt of the service of plaintiffs' interrogatories to such interrogatories, provided that such interrogatories are served not later than January 10, 1975, and provided further that the defendants may apply for an extension of time for good cause; and

3. That the defendants' Motion for Stay of Proceedings filed on December 16, 1974, be, and the same hereby is, denied.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES
DISTRICT JUDGE

DATED: December 18, 1974

Supreme Court, U. S.
FILED
MAY 15 1975
MICHAEL RODAK, JR., CLERK

No. 74-744

In the Supreme Court of the United States

OCTOBER TERM, 1974

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
STUART A. SMITH,
Assistant to the Solicitor General,
ERNEST J. BROWN,
ROBERT S. WATKINS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	11
Argument	16
The Commissioner of Internal Revenue is not required to prove his good faith and the facts upon which a tax assessment is based before the bar of the Anti-Injunction Act is applicable	16
A. The Anti-Injunction Act prohibits this suit to enjoin the assessment or collection of a tax	16
B. Under this Court's *Williams Packing* exception to the Anti-Injunction Act, the taxpayer bears the burden of proving that under no circumstances could the government prevail on the merits of its claim	23
C. Respondent has not met the burden of proving that under no circumstances would the government prevail on the merits of its claim	31
Conclusion	35
Appendix	37

CITATIONS

Cases:

	Page
Alexander v. *"Americans United" Inc.*, 416 U.S. 752	5, 20
Bailey v. *George*, 259 U.S. 16	19
Bob Jones University v. *Simon*, 416 U.S. 725	5, 11, 13, 14, 16, 19–22, 24, 25, 28, 35
Bull v. *United States*, 295 U.S. 247	26
Cheatham v. *United States*, 92 U.S. 85	17
Child Labor Tax Case, 259 U.S. 20	19
Dodge v. *Osborn*, 240 U.S. 118	19, 32
Enochs v. *Williams Packing Co.*, 370 U.S. 1	11, 13–16, 19–34
Hamilton v. *United States*, 309 F. Supp. 468, affirmed *per curiam*, 429 F. 2d 427, certiorari denied, 401 U.S. 913	30
Hill v. *Wallace*, 259 U.S. 44	20
Iannelli v. *Long*, 487 F. 2d 317	25
James v. *United States*, 510 F. 2d 860	29
Lesser v. *United States*, 368 F. 2d 306	26
Lipke v. *Lederer*, 259 U.S. 557	20
Lucas v. *Structural Steel Co.*. 281 U.S. 264	26
Lucia v. *United States*, 474 F. 2d 565	29–31
Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498	20, 21
Pacific Steam Whaling Co. v. *United States*, 187 U.S. 447	19
Phillips v. *Commissioner*, 283 U.S. 589	18
Pizzarello v. *United States*, 408 F. 2d 579	29, 31
Regal Drug Corp. v. *Wardell*, 260 U.S. 386	20
Sherman v. *Nash*, 488 F. 2d 1081	25, 32
Snyder v. *Marks*, 109 U.S. 189	17, 19, 31
State Railroad Tax Cases, 92 U.S. 575	17
United States v. *Lease*, 346 F. 2d 696	26
United States v. *Rexach*, 482 F. 2d 10, certiorari denied, 414 U.S. 1039	26

Cases—Continued

	Page
United States v. *W. T. Grant Co.*, 345 U.S. 629	28
United Transportation Union v. *Michigan Bar*, 401 U.S. 576	28
Welch v. *Helvering*, 290 U.S. 111	26
Wickwire v. *Reinecke*, 275 U.S. 101	26
Statutes:	
Act of March 2, 1867, Sec. 10, 14 Stat. 475	17
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 6201	16
Sec. 6211	2
Sec. 6211(a)	37
Sec. 6212	2, 18
Sec. 6212(a)	4, 37
Sec. 6213	2, 18
Sec. 6213(a)	5, 18, 38
Sec. 6331	2, 4, 16
Sec. 6331(a)	38
Sec. 6331(b)	39
Sec. 6532	18
Sec. 6861	2, 3, 16, 18
Sec. 6861(a)	39
Sec. 6861(b)	4, 40
Sec. 7421	2
Sec. 7421(a)	2, 11, 16, 17, 40
Sec. 7422	18, 21
28 U.S.C. 1346	18, 21
28 U.S.C. 1491	18
Revenue Act of 1924, 43 Stat. 253	18
Sec. 274(d), 43 Stat. 297	18
Miscellaneous:	
Rev. Proc. 60–4, 1960–1 Cum. Bull. 877	3
Rules of Practice and Procedure of the United States Tax Court (January 1, 1974):	
Rule 81(e)(2)	24
Rule 81(i)	24
Rule 142(a)	28

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-744

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the district court (Pet. App. A 1A–2A) is not reported. The opinion of the court of appeals (Pet. App. B 3A–17A) is reported at 499 F. 2d 527.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1974 (Pet. App. C 18A–19A), and a petition for rehearing was denied on July 17, 1974 (Pet. App. D 20A–21A). By order dated October 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 14, 1974. The petition for a writ of certiorari was

filed on December 13, 1974, and was granted on February 18, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Anti-Injunction Act (Section 7421(a) of the Internal Revenue Code of 1954) prohibits a suit in any court by any person for the purpose of restraining the assessment or collection of any tax.

The question presented is whether the Commissioner of Internal Revenue is required to prove his good faith and the facts upon which a tax assessment is based before the bar of the Anti-Injunction Act is applicable.

STATUTES INVOLVED

The pertinent provisions of Sections 6211, 6212, 6213, 6331, 6861, and 7421 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra,* pp. 37–40.

STATEMENT

1. Respondent[1] is a citizen of Israel who entered the United States in 1970. Some time after his arrival in this country, respondent was indicted in Israel for securities fraud. The Israeli government sought his extradition, and respondent contested the extradition request in the United States District Court for the Southern District of New York. The district court found him extraditable (352 F. Supp. 641, on review

[1] References to "respondent" are to Samuel Shapiro. His wife, Bella Shapiro, is a party only because of her co-ownership of property subject to federal tax liens.

sub nom. Shapiro v. *Ferrandina,* 355 F. Supp. 563) and the Second Circuit affirmed (478 F. 2d 894). Respondent filed a petition for a writ of certiorari (No. 72–1701), which he agreed to withdraw and to surrender voluntarily for extradition after receiving assurances from the Israeli government that he could be released on bail pending his trial on the securities fraud charges (Pet. App. B 4A–5A).

The agreed extradition date was December 9, 1973. On December 6, 1973, the Commissioner of Internal Revenue made jeopardy assessments of income taxes for 1970 and 1971 against respondent in accordance with Section 6861 of the Internal Revenue Code of 1954.[2] The assessments aggregated $92,726.41. On the same date, the Internal Revenue Service filed tax liens against respondent and served notices of levy upon various banks in the State of New York where respondent maintained accounts or had safe deposit boxes (Pet. App. B 4A–5A).

The Internal Revenue Service took these actions after completion of an income tax investigation of respondent that had commenced on September 24, 1973 (A. 128). Although the Internal Revenue Service was aware that an extradition proceeding was pending against respondent, the first time that the revenue agent assigned to the case was advised that any date for respondent's departure had been set was on November 28, 1973 (A. 129–130).

[2] In accordance with the procedures set forth in Rev. Proc. 60–4, 1960–1 Cum. Bull. 877, the jeopardy assessments were approved by the responsible District Director of Internal Revenue (A. 130).

Respondent thereupon commenced this action [3] in the United States District Court for the District of Columbia to require the Commissioner to lift the notices of levy [4] and to prohibit the government from executing the extradition warrant pending resolution of the tax dispute (A. 8–16). Respondent moved for a temporary restraining order (A. 17–19), in support of which he submitted an affidavit denying that he owed any additional taxes (A. 20–21). After a hearing (A. 30–70), the district court granted respondent a temporary restraining order (A. 71–72). The district court held a subsequent hearing on respondent's motion for a preliminary injunction (A. 95–127).

Two days later, on December 21, 1973, the Commissioner mailed a notice of deficiency to respondent, pursuant to Sections 6861(b) and 6212(a) of the Code. The notice of deficiency advised respondent that the 1970 assessment was based upon unexplained bank deposits by him of $18,000, and that the 1971 assessment was based upon unreported income of $137,280 from respondent's activities as a dealer in narcotics, specifically from sales of hashish (Pet. App. B 5A–6A; A. 132–136).

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[3] The present case was styled *Samuel Shapiro and Bella Shapiro* v. *Secretary of State, et al.* in the courts below because of the question relating to respondent's extradition. Since the extradition is no longer at issue, the Commissioner of Internal Revenue is the only petitioner.

[4] On October 11 and 15, 1974, the Internal Revenue Service served new notices of levy against respondent. Consequently, his property remains subject to the distraint procedures provided by Section 6331 of the Code.

At a final hearing held on December 21, 1973 (A. 137–160), at which one of the counsel for respondent stated to the court that respondent had informed another of his counsel that the Commissioner's determination of narcotics dealing was false (A. 138), the district court dismissed respondent's suit for injunctive relief (Pet. App. A 1A–2A). It held that it lacked jurisdiction to enjoin execution of the extradition warrant. The district court further concluded that the Anti-Injunction Act barred respondent's action to enjoin the assessment and collection of taxes because it could not find: (1) that under no circumstances could the government prevail on the merits of its claim; and (2) that respondent was threatened with irreparable injury for which there was no adequate legal remedy, since he could seek a redetermination of the deficiencies in the Tax Court (A. 153–155).

Shortly thereafter, on January 3, 1974, pursuant to Section 6213(a) of the Code, respondent filed a petition in the Tax Court for a redetermination of the deficiencies set forth in the Commissioner's statutory notice (*Shapiro* v. *Commissioner,* No. 178–74). That proceeding (A. 161–162) is presently pending.

On the same day (May 15, 1974) that this Court announced its decisions in *Bob Jones University* v. *Simon,* 416 U.S. 725, and *Alexander* v. *"Americans United" Inc.,* 416 U.S. 752, the court of appeals [5] re-

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[5] Upon his appeal to the court of appeals, respondent filed in this Court an application for a continuation of the court of appeals' stay of the extradition order pending oral argument and decision by the court of appeals (No. A–788). On May 16, 1974, the day following the decision by the court of appeals,

versed and remanded the case for an examination of the facts upon which the Commissioner based his tax assessment against respondent.[a]

In so remanding, the court of appeals concluded that "the District Judge * * * should not have dismissed the complaint on the bare record before him" and observed that "the District Judge might have allowed Shapiro an opportunity to discover more evidence, or he could have compelled the Commissioner to provide factual support for the asserted deficiency" (Pet. App. B 13A). It further stated that "[W]hile it is not probable that the Government created the deficiency out of whole cloth, it is equally true that '[the Government's] burden [to show good faith] is not met by mere "protestations of good faith and conclusory statements of plaintiff's tax liability * * *"'" (Pet. App. B 16A).

the Chief Justice dismissed the application as moot. Although respondent contended (A. 13–14), and the court of appeals was of the view, that the jeopardy assessment and levies would cause him irreparable injury by freezing funds that he intended to use to post bond in Israel to avoid incarceration (Pet. App. B 17A), respondent was in fact released on bond in Israel upon his extradition without the use of the funds frozen by the Service's levies. His release on bond was allegedly made possible because the Israeli government reduced the amount previously requested as security for his appearance, and because a relative in Israel agreed to provide her apartment as partial security for his appearance. (See Appellants' Opposition to Motion to Stay Mandate filed in the court of appeals on July 30, 1974, p. 4.)

[a] The court of appeals also affirmed the district court's dismissal of respondent's suit to enjoin the execution of the extradition warrant. However, the extradition is not at issue here.

2. Subsequent to the decision by the court of appeals, the district court ordered the government to "file with the Court and serve on the Plaintiffs * * * the factual submission upon which the government seeks to rely as providing a factual foundation that Plaintiff Shapiro was a narcotics dealer and that the government's calculation of the deficiency has a rational basis, so that the Court can determine if the claim is 'entirely excessive, arbitrary, capricious, and without factual foundation'" (Order of October 29, 1974).

Pursuant to the district court's order, the government submitted an affidavit of the revenue agent who investigated respondent's income tax liabilities (see n. 7, *infra*, p. 10). The affidavit stated that the basis for the deficiencies determined by the Commissioner was as follows:

(*a*) There was no record that Samuel Shapiro had filed an income tax return for 1970.

(*b*) Samuel Shapiro had filed an income tax return for 1971 reporting no tax liability based upon $1,600 in adjusted gross income, consisting of $2,600 miscellaneous income from private tutoring, and net short-term losses from commodity transactions of $1,450 (limited to $1,000 in computing taxable income).

(*c*) Deposits were credited to two acounts in the name of Samuel Shapiro at the First National City Bank, New York, Nos: 04993564 and 05008773, of $18,000 in 1970 and $36,735 in 1971.

(*d*) Samuel Shapiro paid more than $3,000 in cash for the purchase of an automobile in early 1972.

(*e*) Information available to the Internal Revenue Service indicated that early in 1973 Samuel Shapiro paid more than $40,000 in cash for a home the price of which was $60,000.

(*f*) Information supplied to the Internal Revenue Service indicated that Samuel Shapiro had been smuggling into the United States substantial amounts of an illegal substance, hashish, every six days from Israel, presumably for resale within the United States, and that Samuel Shapiro was dealing in hashish, during 1971.

(*g*) The 1971 bank deposits referred to in subparagraph (*c*) above included money received from an individual since convicted of selling hashish, who stated that the payments were for hashish Samuel Shapiro supplied to him as follows:

April 19, 1971	$2,000
April 23, 1971	2,300
May 6, 1971	2,000
May 11, 1971	1,500
June 8, 1971	1,500
August 18, 1971	5,600

(*h*) Information available to the Internal Revenue Service indicated that the known practice in hashish trafficking was to deal in full kilos (kilograms), equal to 2.2 pounds; that during 1971 the retail price of hashish was $1,760 to $1,980 per pound, or $2,992 to $4,356 per kilo; that the wholesale cost to a dealer would approximate $2,350 per kilo; and the common practice in hashish dealing was to receive payment in two parts—the first for cost and the second for profit.

(*i*) On the basis of the information set forth in subparagraphs (*g*) and (*h*) above, the revenue agent

concluded that during 1971 Samuel Shapiro was dealing in at least two kilos of hashish per week, and that his taxable profit therefrom was $137,280, computed as follows:

Selling price	$7,340
Less cost	−4,700
Weekly profit	2,640
1971 profit (52 weeks)	$137,280

(*j*) The revenue agent also concluded that the unexplained deposits of $18,000 during 1970 were taxable income (affidavit of November 8, 1974, of Revenue Agent Richard A. Conde, pp. 2–4).

At a hearing held by the district court on November 12, 1974, respondent submitted two affidavits (which had been filed in the Tax Court) denying that he was or ever had been a dealer in narcotics. Respondent's affidavits further stated that his 1971 income tax return was correct. Respondent also submitted an affidavit of Rachel Laub, a resident of Switzerland, which stated that at respondent's request in 1970, she held for him in safekeeping $50,000 in cash and approximately 18 to 20 kilos of gold bars. That affidavit further stated that at respondent's request, she transmitted the cash to him in 1971, and the proceeds of the sale of the gold bars ($32,000 and $35,000) in 1971 and 1972, respectively (affidavits of Samuel Shapiro and Rachel Laub, dated February 14, 1974, and December 11, 1973).

At the conclusion of the hearing on remand, the district court ruled that the revenue agent's affidavit was insufficient to invoke the bar of the Anti-Injunc-

tion Act. The court stated to counsel for the government as follows: "I think I am going to have to have some more information. Otherwise, I don't think this affidavit is sufficient. Unless you are willing to submit the informant to examination by the court and the information upon which the affidavit was based by [the revenue agent], I am not fully satisfied, in all candor * * * I just don't feel that this affidavit is sufficient for the court to overcome what the Court of Appeals said the government had to do" (Tr. of Proceedings of November 12, 1974, pp. 71–72).[7]

On November 18, 1974, the government advised the district court that it had decided not to submit additional documentary evidence or testimony of its confidential informants at that time for *in camera* examination or otherwise.[8]

[7] As noted in the petition for a writ of certiorari (p. 9, n. 6), the record transmitted by the court of appeals does not include any of the material with respect to the remand proceeding. We have therefore lodged with the Clerk copies of the October 29, 1974 order of the district court, affidavits filed by the parties, and the transcript of the hearing held by the district court on November 12, 1974.

[8] When the government filed its petition for a writ of certiorari on December 13, 1974, it also moved in the district court for a stay of proceedings pending the disposition of the case by this Court. On December 18, 1974, the district court denied the government's motion for such a stay (Br. in Opp. App. C 4a). However, on January 3, 1975, the court of appeals granted the government's motion for a stay of further proceedings in the district court and further ordered, *sua sponte*, that the clerk of the district court return the certified copy of the court of appeals' judgment pending consideration by this Court of the petition for a writ of certiorari (Br. in Opp. App. A 1a; App. B 2a).

At a hearing held on December 17, 1974,[9] the district court reaffirmed its conclusion that the revenue agent's affidavit did not "provide a rational factual basis for the assessment and levy in this case, which would be sufficient to oust this court's jurisdiction [under the Anti-Injunction Act]" (Tr. 2–3). As a result, the district court ordered that the parties be permitted to engage in pretrial discovery (Br. in Opp. App. C 3a–4a).

SUMMARY OF ARGUMENT

A

The federal Anti-Injunction Act, 26 U.S.C. 7421 (a), which was enacted over a century ago, provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." Last Term in *Bob Jones University* v. *Simon,* 416 U.S. 725, this Court reaffirmed the narrowly limited exception to the statutory prohibition on injunctions against tax assessments which it originally announced in *Enochs* v. *Williams Packing Co.,* 370 U.S. 1. In that case, the Court unanimously held that a taxpayer could obtain an injunction against assessment or collection of taxes only if he satisfied a two-fold test: First, he must show that "it is clear that under no cir-

[9] We are lodging with the Clerk a copy of the transcript of the hearing held by the district court on December 17, 1974.

cumstances could the Government ultimately prevail" on the merits of its legal claim; secondly, he must show that "equity jurisdiction otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy (370 U.S. at 7).

Respondent's suit comes within the literal bar of the Anti-Injunction Act since it sought to restrain the "assessment or collection of any tax * * *." The court of appeals, however, reversed the district court's dismissal of respondent's suit and remanded the case for a further hearing. In so remanding, the court of appeals concluded that given respondent's implicit denial of liability for the amounts assessed and of the determinations in the Commissioner's notice of deficiency, the district court should not have dismissed the complaint on the bare record before him. In so holding, the court imposed upon the Commissioner the

burden of proving his good faith and the facts upon which the tax assessment was based before the bar of the Anti-Injunction Act would have been applicable.

B

The remand by the court of appeals is contrary to *Williams Packing* and *Bob Jones University*. While this Court has created a limited exception to the Anti-Injunction Act, where a taxpayer demonstrates that under no circumstances can the government prevail on the merits of its legal claim and where he is otherwise entitled to equitable relief, the burden to meet the two-fold *Williams Packing* test rests on the taxpayer.

Williams Packing does not suggest that once the taxpayer simply denies his liability for an additional assessment, the Commissioner is required to come forward in an injunctive action with evidence of his good faith and to prove the facts upon which his assessment is based. As the Court there observed, "the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid" (370 U.S. at 8). Similarly, in *Bob Jones University*, the Court flatly imposed the burden of proof upon the taxpayer

575-898—75——3

by stating "that petitioner has not shown that the Service's action is without an independent basis in the requirements of the Code" (416 U.S. at 740). In the absence of such proof by the taxpayer, the Court held that the *Williams Packing* test had not been met, and that the bar of the Anti-Injunction Act was therefore applicable.

These statements by the Court that a tax assessment is presumed to have been made in good faith so as to be entitled to the protection of the Anti-Injunction Act are hardly fortuitous. They rest upon the well-established rule which is implicit in the *Williams Packing* test but which was ignored by the court of appeals that a tax assessment is presumptively valid and that the burden is upon the taxpayer to prove its invaldity. Thus, in a post-assessment collection action brought by the Commissioner, the taxpayer has the burden of proving that the assessment is erroneous if he is to avoid its execution by collection. Nothing in the nature of a taxpayer-initiated injunctive action supports the conclusion of the court of appeals that the Commissioner should be compelled to come forward in such a proceeding with evidence that his assessment was made in good faith and is correct. The same presumptions of good faith and correctness of a tax assessment that are applicable in a civil collection proceeding are equally applicable, if not more so, in a suit to enjoin assessment or collection. The burden of proof to establish the applicability of the

Williams Packing exception therefore rests squarely on the taxpayer.

C

The record in this case does not even suggest, much less support, the conclusion that under no circumstances would the government prevail on the merits of its claim under the *Williams Packing* test. The only evidence submitted by respondent to the district court during the first proceeding was a single affidavit which simply alleged that he was not liable for the additional amount assessed. This blanket denial of liability is insufficient to meet the *Williams Packing* test. Moreover, even after the Commissioner issued the notice of deficiency to respondent determining that he had unreported income from activities as a dealer in narcotics, respondent still failed to produce any evidence to establish that the assessment was without foundation. Thus, respondent has not even demonstrated that he would be likely to prevail, much less that "under no circumstances" would the government prevail on the merits of its claim. There was accordingly no basis for the further remand hearing. The court of appeals should have affirmed the district court's dismissal of the complaint.

The effect of the decision below has been to allow the simple denial of liability by a taxpayer to put the Commissioner's assessment "on trial" at a protracted injunctive proceeding in which the government would be forced to prove its good faith and the facts upon

which assessment was based. If the decision is permitted to stand, the litigation of every jeopardy assessment will be converted into an injunctive action at which the usual burden of proof rule applicable in federal tax litigation will be inverted. Such a radical departure from the rule of *Williams Packing* and *Bob Jones University* would, like the repudiated decisions of an earlier day, "simply revive the evisceration of the [Anti-Injunction] Act." *Bob Jones University* v. *Simon, supra,* 416 U.S. at 745–746.

ARGUMENT

THE COMMISSIONER OF INTERNAL REVENUE IS NOT REQUIRED TO PROVE HIS GOOD FAITH AND THE FACTS UPON WHICH A TAX ASSESSMENT IS BASED BEFORE THE BAR OF THE ANTI-INJUNCTION ACT IS APPLICABLE

A. THE ANTI-INJUNCTION ACT PROHIBITS THIS SUIT TO ENJOIN THE ASSESSMENT OR COLLECTION OF A TAX

1. The federal Anti-Injunction Act, 26 U.S.C. 7421 (a), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." Here, after an investigation of respondent's tax liability for the years 1970 and 1971, the Commissioner of Internal Revenue concluded that assessment or collection of the deficiencies he determined would be jeopardized by delay. Acting pursuant to his authority under Sections 6861, 6201, and 6331 of the Code, the Commissioner made jeopardy assessments against respondent of $92,726.41, filed tax liens and served notices of levy upon respondent's property. Respondent thereupon brought this action requesting the court to "order the * * *

Commissioner of Internal Revenue and his agents to take all action necessary to lift the Notices of Levy * * *" (A. 15). The issue is whether the Commissioner of Internal Revenue is required to prove his good faith and the facts upon which his tax assessment is based before the jurisdictional bar of the Anti-Injunction Act becomes applicable.

The statutory prohibition against equitable relief in tax cases was enacted in 1867 [10] in order to prevent the wave of injunctive suits that had swept over the state taxation systems from similarly inundating the federal tax system. See *State Railroad Tax Cases,* 92 U.S. 575, 613–614. By foreclosing pre-enforcement judicial interference, the Act insures the government's ability to assess and collect taxes as expeditiously as possible. Within a decade after the passage of the Anti-Injunction Act, this Court recognized the congressional policy that underlay its passage, namely, that if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government would be threatened. See *Cheatham* v. *United States,* 92 U.S. 85, 89; *Snyder* v. *Marks,* 109 U.S. 189, 193–194. As the Court stated in the latter case, the statute declares that revenue officers "shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question have made the ~~assignment~~ ASSESSMENT and claim that it is valid" (109 U.S. at 194).

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[10] The statute originated as Section 10 of the Act of March 2, 1867, 14 Stat. 471, 475, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

Thus, by foreclosing injunctive suits against the assessment or collection of taxes, the Act reflects a legislative policy that disputes between taxpayers and the Treasury be adjudicated solely within the statutory scheme prescribed by Congress.[11]

[11] While Congress has foreclosed injunctive actions to restrain the assessment and collection of taxes, it has established a statutory scheme which generally provides taxpayers with two methods of obtaining judicial review of tax disputes with the Treasury. First, with respect to income, estate, and gift taxes, a taxpayer may obtain review of a notice of deficiency without having to pay the disputed amount by filing a timely petition in the Tax Court. Sections 6212 and 6213 of the Code, Appendix, *infra*, pp. 37–38. Alternatively a taxpayer may pay the disputed amount of any type of tax, file a claim for refund, and obtain judicial review of the Commissioner's denial of the claim (or his failure to act on the claim within six months) by a suit for refund in a district court or in the Court of Claims. Sections 6532 and 7422 of the Code; 28 U.S.C. 1346 and 1491.

The existence of the Tax Court review procedure does not conflict with the government's fundamental right to assess and collect taxes prior to litigation. Prior to the establishment of the Board of Tax Appeals (now the Tax Court) by the Revenue Act of 1924, 43 Stat. 253, judicial review of a tax assessment could be obtained only in a refund suit. However, Section 274(d) of the Revenue Act of 1924, 43 Stat. 297, provided that if the Commissioner believed that the assessment or collection of a deficiency would be jeopardized by delay, he was required immediately to assess the tax at any time before or during the Tax Court proceedings. This statutory requirement has been continued in Section 6861 of the 1954 Code, Appendix, *infra*, pp. 39–40, and was employed against respondent because of his scheduled departure from the United States. Thus, the qualified prefatory exception in the Anti-Injunction Act—"[e]xcept as provided in sections 6212(a) and (c), [and] 6213(a) * * *" which relates to cases over which the Tax Court has jurisdiction—does not apply here because of the explicit statutory exception in Section 6213(a) for jeopardy assessments under Section 6861. See *Phillips* v. *Commissioner*, 283 U.S. 589, 596, n. 6.

Only last Term in *Bob Jones University* v. *Simon*, 416 U.S. 725, the Court again considered the Anti-Injunction Act. There, a tax-exempt organization brought suit to enjoin the Commissioner's revocation of its exempt status. In holding that such a claim was barred by the Act, the Court stated that the language of the statute—"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court * * *"—"could scarcely be more explicit" (416 U.S. at 736). As the Court pointed out (*id.* at 742), this emphasis upon the literal terms of the Act was consistent with its earlier decisions during the first half century of the Act's existence which applied the stringent statutory language with literal force, without regard to the character of the tax, the nature of the challenge, or the effect of collection upon the taxpayer. See *Snyder* v. *Marks*, *supra*; *Pacific Steam Whaling Co.* v. *United States*, 187 U.S. 447; *Dodge* v. *Osborn*, 240 U.S. 118; *Bailey* v. *George*, 259 U.S. 16.[12]

Although several of the Court's subsequent decisions departed from a literal reading of the Anti-Injunction Act,[13] *Bob Jones University* reaffirmed the Court's adherence to the narrow exception announced in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, which "gave the Act almost literal effect" (416 U.S. at 737).

[12] In *Bailey* v. *George*, *supra*, the Court refused to enjoin the collection of a child labor tax despite the contention that the purpose of the tax was not raising revenue but regulating child labor. The Court rejected the taxpayer's claim for equitable relief notwithstanding its holding on the same day that the tax was unconstitutional. *Child Labor Tax Case*, 259 U.S. 20. See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 740–741.

See also *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 758. The unanimous opinion in *Williams Packing* was meant to be "the capstone of judicial construction of the Act * * * spell[ing] an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose." *Bob Jones University* v. *Simon, supra,* 416 U.S. at 742.

In *Williams Packing,* the Court announced a limited exception to the statutory prohibition on injunctions against tax assessment or collection activities by the Treasury. In that case, it unanimously held that a taxpayer could obtain an injunction against assessment or collection of taxes only if he satisfied a two-fold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; second, he must show that "equity jurisdiction otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy (370 U.S. at 7).

There, the taxpayer sought an injunction against the collection of social security and unemployment taxes claimed by the Internal Revenue Service to be past due. The taxpayer asserted that collection of the taxes would cause it irreparable injury. However, because the record revealed that "the Government's claim of liability was not without foundation" (370

[13] See, *e.g.*, *Hill* v. *Wallace*, 259 U.S. 44; *Lipke* v. *Lederer*, 259 U.S. 557; *Regal Drug Corp.* v. *Wardell*, 260 U.S. 386; *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498.

U.S. at 8), there was no need for the Court to determine whether a refund suit [14] provided the taxpayer with an adequate legal remedy.[15] No suit for an injunction could be maintained because it was not apparent "under the most liberal view of the law and the facts, [that] the United States [could] not establish its claim" (370 U.S. at 7).

2. The applicability of the *Williams Packing* exception to the Anti-Injunction Act is at issue in this case. In light of the relief requested by respondent that the court "order the * * * Commissioner of Internal Revenue and his agents to take all actions necessary to lift the Notices of Levy * * *" (A. 15), there can be no doubt that his suit comes within the literal bar of the Anti-Injunction Act since it plainly sought to restrain the "assessment or collection of any tax * * *." If the Commissioner's notices of levy were removed from re-

[14] Because *Williams Packing* involved employment (F.I.C.A. and F.U.T.A.) taxes over which the Tax Court has no jurisdiction, the opinion only referred to a refund suit. See 28 U.S.C. 1346 and Section 7422 of the Internal Revenue Code of 1954. This case, however, involves income taxes with respect to which the Tax Court has jurisdiction. In fact, respondent has filed a petition in the Tax Court for redetermination of the deficiencies at issue (A. 161–162).

[15] Although the Court in *Williams Packing* did not reach the question whether a refund suit was an adequate legal remedy, it held that an injunction suit "may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6). In so holding, the Court rejected the "extraordinary and exceptional circumstances" test of *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, a standard which the Court later characterized as an "evisceration of the [Anti-Injunction] Act." *Bob Jones University* v. *Simon, supra,* 416 U.S. at 746.

spondent's property in advance of litigating the merits of the controversy, there is a strong likelihood that collection would be defeated. This is the very situation that the Anti-Injunction Act was designed to remedy.

The court of appeals, however, reversed the district court's holding that the Act was applicable. Instead, it remanded the case to the district court to "obtain some evidence by which to judge whether the asserted deficiency was a tax or was so arbitrary and excessive as to be 'an exaction in the guise of a tax'" (Pet. App. B 16A). In so remanding, the court of appeals concluded that "the District Judge * * * should not have dismissed the complaint on the bare record before him" and observed that "the District Judge might have allowed Shapiro an opportunity to discover more evidence, or he could have compelled the Commissioner to provide factual support for the asserted deficiency" (Pet. App. B 13A). The court of appeals further stated that "[W]hile it is not probable that the Government created the deficiency out of whole cloth, it is equally true that '[the Government's] burden [to show good faith] is not met by mere "protestions of good faith and conclusory statements of plaintiff's tax liability"'" (*id.* at 16A).

The remand by the court of appeals is contrary to *Williams Packing* and *Bob Jones University*. While this Court has created a limited exception to the Anti-Injunction Act where a taxpayer demonstrates that under no circumstances can the government prevail on the merits of its claim, and where he is otherwise

entitled to equitable relief, the burden to meet the two-fold *Williams Packing* test rests squarely on the taxpayer. Thus, where, as here, the record is bare of any factual basis for the conclusion that the government would under no circumstances prevail on the merits of its claim, the complaint must be dismissed. The correct application of the *Williams Packing* test, to which we now turn, does not require the Commissioner to come forward with evidence of his good faith and to prove the facts upon which a tax assessment is based before the bar of the Anti-Injunction Act is applicable.

B. UNDER THIS COURT'S *WILLIAMS PACKING* EXCEPTION TO THE ANTI-INJUNCTION ACT, THE TAXPAYER BEARS THE BURDEN OF PROVING THAT UNDER NO CIRCUMSTANCES COULD THE GOVERNMENT PREVAIL ON THE MERITS OF ITS CLAIM

1. The court of appeals appears to have acknowledged (Pet. App. B 9A) that the statutory prohibition against assessment or collection of taxes is subject to the single limited exception created by this Court in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1. As we have shown, that exception is applicable only when two conditions are met: (1) that under no circumstances could the government prevail on the merits of its legal claim; and (2) that the taxpayer is otherwise entitled to equitable relief because collection of the tax would cause irreparable injury. The court of appeals concluded that in order to determine whether the *Williams Packing* exception is applicable, the district court should conduct a wide-ranging factual inquiry in which the Commissioner must come forward with evidence of his good faith and in support of his tax assess-

ment.[16] It therefore remanded the case to the district court to conduct such an inquiry, at which it would allow "Shapiro an opportunity to discover more evidence, or * * * [compel] the Commissioner to provide factual support for the asserted deficiency" (Pet App. B 13A).

This disposition by the court of appeals is incompatible with *Williams Packing* and *Bob Jones University*. Those cases do not suggest that once the taxpayer simply denies his liability, the Commissioner is required to come forward in an injunctive action

[16] Although the focus of our argument is on the court of appeals' conclusion with respect to the "under no circumstances" part of the *Williams Packing* test, the court of appeals also erred in holding that respondent met the irreparable injury component of the *Williams Packing* test (Pet. App. B 17A). It based this conclusion upon the alleged fact that the tax levies froze funds respondent intended to use to post bond in Israel. But *Williams Packing* explicitly held that the bar of the Anti-Injunction Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6).

Like *Bob Jones University*, this is not a case where respondent has no access to judicial review of the Commissioner's assessment. Indeed, he has commenced a proceeding in the Tax Court for a redetermination of the deficiencies at issue. The fact that respondent may be confined in Israel will not prevent him from presenting his case to the Tax Court. Pursuant to that court's rules, depositions may be taken in foreign countries and may be used at trial when the witness is unable to testify in person. See Rule 81(e)(2) and (i) of the Rules of Practice and Procedure of the United States Tax Court (January 1, 1974).

At all events, the remand proceedings have demonstrated that respondent was in fact released on bond in Israel upon his extradition without the use of any of the funds frozen by the Service's levies. See n. 5, pp. 5–6, *supra*. The assumption upon which the court of appeals premised its "irreparable injury" holding is therefore no longer valid.

with evidence of his good faith and to prove the facts upon which his tax assessment is based. Indeed, they support quite the opposite conclusion. As the Court observed in *Williams Packing*, "the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid. *Snyder* v. *Marks*, 109 U.S. 189, 194" (370 U.S. at 8).

Similarly, in *Bob Jones University* v. *Simon, supra*, which upheld the dismissal of an injunctive suit brought by a taxpayer who attributed non-tax motives to the Commissioner's action, the Court flatly imposed the burden of proof upon the taxpayer by stating that "petitioner has not shown that the Service's action is without an independent basis in the requirements of the Code" (416 U.S. at 740). In the absence of such proof by the taxpayer, the Court stated that "[t]here is no evidence that [the Commissioner's position] does not represent a good-faith effort to enforce the technical requirements of the tax laws, and * * * we cannot say that its position has no legal basis or is unrelated to the protection of the revenue. That Act is therefore applicable" (*ibid.*).[17]

[17] There is nothing in the record that would support a conclusion that the tax assessments against respondent were anything other than "bona fide and potentially productive attempts to collect revenue." See *Iannelli* v. *Long*, 487 F. 2d 317, 318 (C.A. 3). The chronology of the tax investigation of respondent demonstrates that the Service did not attempt to delay the jeopardy assessments beyond the date of his extradition (A. 128–130). Thus, *Sherman* v. *Nash*, 488 F. 2d 1081 (C.A. 3), upon which respondent relies (Br. in Opp. 5, n. 3), is distinguish-

These statements by the Court that a tax assessment is presumed without further proof to have been made in good faith so as to be entitled to the protection of the Anti-Injunction Act are hardly fortuitous. They rest upon the well-established rule, which is implicit in the *Williams Packing* test but which the court of appeals ignored, that a tax assessment is presumptively valid and that the burden is on the taxpayer to prove its invalidity. See, *e.g., Wickwire* v. *Reinecke,* 275 U.S. 101, 105; *Lucas* v. *Structural Steel Co.,* 281 U.S. 264, 271; *Welch* v. *Helvering,* 290 U.S. 111, 115; and *Bull* v. *United States,* 295 U.S. 247, 260. As these decisions point out, the force of a tax assessment is analogous to a judgment which has the presumption of administrative regularity, pursuant to which the governmental officers are deemed to have acted reasonably and according to law. Thus, in a post-assessment collection action brought by the Commissioner, the taxpayer has the burden of proving that the assessment is erroneous if he is to avoid its execution by collection. See, *e.g., United States* v. *Rexach,* 482 F. 2d 10, 15–18 (C.A. 1), certiorari denied, 414 U.S. 1039; *Lesser* v. *United States,* 368 F. 2d 306, 309–310 (C.A. 2) (*en banc*); *United States* v. *Lease,* 346 F. 2d 696, 698–701 (C.A. 2). The principle is equally, if not more, important under the Anti-Injunction Act, whose pur-

able. There, the court of appeals remanded an injunctive suit to the district court to consider whether the assessments were intended to coerce the taxpayers for improper purposes unrelated to the collection of taxes.

pose is to prevent judicial nullification of the collection of necessary tax revenues.

Nothing in the nature of a taxpayer-initiated injunctive action supports the conclusion of the court of appeals that the Commissioner should be compelled to come forward in such a proceeding with evidence that his assessment was made in good faith and is correct. The same presumptions of good faith and correctness of a tax assessment that are applicable in a civil collection proceeding are equally applicable, if not more so, in a suit to enjoin assessment or collection. As the Court observed in *Williams Packing,* "[t]o require more than good faith on the part of the Government would unduly interfere with a collateral objective of the [Anti-Injunction] Act—protection of the collector from litigation pending a suit for refund" (370 U.S. at 7–8). This congressional policy to channel tax litigation into the prescribed refund suits and Tax Court deficiency proceedings would be disserved by requiring the Commissioner to come forward in an injunctive action with evidence of his good faith and the accuracy of the assessment.

By forcing the government to come forward with such affirmative proof to justify its assessment, the court of appeals has not only inverted the burden of proof applicable in tax cases but has also shifted the forum for the resolution of tax disputes from the congressionally authorized forums to injunctive actions. Thus, the adjudication of this dispute has been taken from the Tax Court, where respondent has filed a

petition and bears the burden of proof pursuant to Rule 142(a) of the rules of that court,[18] to this injunctive suit in the district court. In so doing, it has undermined the purpose of the Anti-Injunction Act, which this Court has consistently recognized is to protect the government's need to assess and collect taxes as expeditiously as possible "and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs* v. *Williams Packing Co., supra,* 370 U.S. at 7. See also *Bob Jones University* v. *Simon, supra,* 416 U.S. at 736–737, and cases cited therein.

In sum, the burden under *Williams Packing* of proving that under no circumstances could the government prevail on the merits of its claim rests squarely on the taxpayer. If this case were considered in the absence of the Anti-Injunction Act, respondent, as the plaintiff in this equitable action, would bear the burden of proving that the Commissioner's assessment was legally incorrect. See, *e.g., United Transportation Union* v. *Michigan Bar,* 401 U.S. 576, 584; *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633. Here, however, where the policy of the Anti-Injunction Act comes into play, a far stronger case is presented for placing the burden of proof upon the taxpayer-plaintiff before a tax assessment can be enjoined. It would be anomalous to shift the

[18] Rule 142(a) of the Rules of Practice and Procedure of the United States Tax Court states: "The burden of proof shall be upon the petitioner [the taxpayer], except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter * * * pleaded in his answer, it shall be upon the respondent [the Commissioner]."

burden of proof to the Commissioner and thereby make the task of obtaining an injunction easier in the face of the applicability of the more stringent "under no circumstances" test of *Williams Packing,* which was designed to enforce the explicit statutory prohibition against injunctions. The policy of the Anti-Injunction Act can be implemented only if the taxpayer bears the burden of proving the applicability of the *Williams Packing* exception.

2. In holding that the Anti-Injunction Act requires a remand proceeding in which, after a simple denial of liability by the taxpayer, the government would be required to come forward with evidence of its good faith and of the correctness of its assessment, the court of appeals (Pet. App. B. 13A–15A) purported to follow *Pizzarello* v. *United States,* 408 F. 2d 579 (C.A. 2), and *Lucia* v. *United States,* 474 F. 2d 565 (C.A. 5) (*en banc*). Whether or not those cases fully conform to this Court's *Williams Packing* decision,[19] they do not hold that the government must prove the correctness of a tax assessment in order to defeat an action brought by the taxpayer to enjoin its assessment.

In *Pizzarello,* the Second Circuit relied upon *Williams Packing* in reversing the denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity. That case, however, is distinguishable. There,

[19] Compare *James* v. *United States,* 510 F. 2d 860, 861 (C.A. 6), where the court expressly declined to follow *Pizzarello* and *Lucia,* stating that those cases "carved out further exceptions" to the Anti-Injunction Act.

the taxpayer had been indicted for operating a gambling establishment for two months. Because of this obvious disparity in the time periods, the court found "no proof in the record * * * that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average * * * represented his average daily business for the other 1,575 days" (408 F. 2d at 583). In determining the assessment to be excessive, the court noted that the Commissioner's determination that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).[20]

Lucia similarly involved a gambling excise tax assessment based upon a projection of wagering activity. There, the taxpayer argued on appeal that he could demonstrate the error of projection employed by the government. In remanding the case to the district court for a factual determination of the taxpayer's allegation that the assessment was without foundation, the Fifth Circuit explicitly stated that "the taxpayer, Lucia, will have to prove his case upon remand, and the extent of our holding goes no further than to give him that opportunity" (474 F. 2d at 575; footnote omitted). Thus, contrary to the decision below, *Lucia* squarely places the burden of meeting the first aspect of the *Williams Packing* test—that the

[20] Compare, however, *Hamilton* v. *United States*, 309 F. Supp. 468 (S.D. N.Y.), affirmed *per curiam*, 429 F. 2d 427, certiorari denied, 401 U.S. 913, where the Second Circuit more recently affirmed the district court's denial of an injunction, although the assessment for wagering taxes, based on records covering three days, was projected over almost four years.

assessment is without any foundation—upon the taxpayer. In that respect, it conflicts with, rather than supports, the court of appeals.

Finally, unlike the taxpayers in either *Pizzarello* or *Lucia,* respondent has not shown that the Commissioner's assessment was without any foundation. The record in this case, to which we now turn, does not even suggest that respondent is likely to prevail, much less show that under no circumstances would the government prevail on the merits of its claim. In light of *Williams Packing,* there was, accordingly, no basis for the further remand proceeding the court of appeals ordered.

C. RESPONDENT HAS NOT MET THE BURDEN OF PROVING THAT UNDER NO CIRCUMSTANCES WOULD THE GOVERNMENT PREVAIL ON THE MERITS OF ITS CLAIM

1. The record shows that respondent introduced no evidence that would cast any doubt upon the Commissioner's good faith or the accuracy of the assessment. Indeed, the only evidence submitted by respondent to the district court during the first proceeding was a single affidavit, appended to his motion for a temporary restraining order, that simply alleged that he filed a tax return for 1971 which was accurate and that he had no income for 1970 (A. 20). This blanket denial of liability does not come even close to meeting the "under no circumstances" test of *Williams Packing.* As this Court held in *Snyder* v. *Marks, supra,* the mere allegation by a taxpayer that an amount has been "erroneously or illegally assessed" will not support injunctive relief where it "is claimed by the

proper public officers to be a tax" (109 U.S. at 192). See also *Dodge* v. *Osborn, supra,* 240 U.S. at 120–121; *Sherman* v. *Nash, supra,* 488 F. 2d at 1084–1085, n. 11. If such a general denial of liability were enough to avoid the prohibition of the Anti-Injunction Act, it would be a rare case in which the statute would apply.

Moreover, even after the Commissioner issued a notice of deficiency to respondent determining that he had unreported income from activities as a dealer in narcotics, respondent still failed to produce any evidence that would establish that the assessment was without foundation. At that juncture, respondent did not even come forward personally to deny the Commissioner's determination. Rather, one of his counsel merely told the district court that respondent had advised another of his counsel that the Commissioner's determination of income from narcotics dealing was false (A. 138). This twice-removed assertion does not even rise to the level of credible evidence, much less establish that the assessment was without foundation.

If, as we submit, the taxpayer has the burden of proving the applicability of the *Williams Packing* exception, respondent's failure to do should have led to the dismissal of the complaint. However, the court of appeals remanded the case to the district court for a further hearing because the filing of the complaint preceded the Commissioner's issuance of the notice of deficiency. In the court of appeals' view, "Shapiro could not deny in his complaint that he was a narcotics dealer * * * [b]ut in the circumstances, such allegations are fairly implicit in the complaint and, broadly construed, the complaint should have been sufficient to withstand the Government's motion to dismiss" (Pet. App. B 12A; footnote omitted).

But contrary to the court's implicit assumption, respondent's denial of the Commissioner's determination in his complaint would not have been sufficient to justify injunctive relief under the *Williams Packing* exception, or to compel the Commissioner to come forward with affirmative evidence in support of the assessment. Indeed, respondent had already denied the Commissioner's determination in his affidavit appended to his motion for a temporary restraining order (A. 20). Reaffirmation of that denial in the complaint cannot justify a different result. Whether these denials take the form of an affidavit or are incorporated in the allegations of a complaint, such self-serving statements will not meet the "under no circumstances" test of *Williams Packing*. Thus, in both instances there would be no basis for the further remand hearing the court of appeals ordered. The dismissal of respondent's complaint should have been affirmed.

2. The disruption to the orderly collection of taxes augured by the decision below has already been amply confirmed by the events which have occurred in the remand proceedings. Pursuant to the district court's order, the government submitted a detailed affidavit of the revenue agent showing the basis for the assessments against respondent. This affidavit demon-

strated that the assessments were made with regularity and in good faith, and that they were not without foundation. Respondent, on the other hand, has simply reiterated his denial of liability through new affidavits and submitted an additional affidavit of a person claiming to have held property for him abroad and to have transmitted to him $82,000 in 1971 and $35,000 in 1972. On this record respondent has not met his burden of proving under *Williams Packing* that "under no circumstances" would the government prevail on the merits of its claim.

Nevertheless, the district court has indicated that the revenue agent's affidavit was insufficient to warrant dismissal and that the government must produce for judicial examination its confidential informant and the information upon which the assessment was based (Tr. of Proceedings of November 12, 1974, pp. 71–72). At the final hearing held by the district court before this Court granted certiorari, the district court reaffirmed its conclusion that the revenue agent's affidavit did not "provide a rational factual basis for the assessment and levy in this case, which would be sufficient to oust this court's jurisdiction [under the Anti-Injunction Act]" (Tr. 2–3). As a result, it ordered that the parties be permitted to engage in pre-trial discovery (Br. in Opp. App. C 3a–4a).

Thus, the effect of the decision below has been to allow the simple denial of liability by a taxpayer to put the Commissioner's assessment "on trial" at a protracted injunctive proceeding in which the government would be forced to prove its good faith and

the facts upon which its assessment was based. Such a significant deviation from settled precedent contravenes the congressional policy that disputes between taxpayers and the Treasury are to be adjudicated in either a refund suit or in a Tax Court proceeding. Moreover, it is squarely at odds with this Court's consistent recognition that the purpose of the Anti-Injunction Act is to protect the government's need to collect taxes as expeditiously as possible. If permitted to stand, the decision of the court of appeals would, like the repudiated decisions of an earlier day, "simply revive the evisceration of the Act." *Bob Jones University* v. *Simon, supra,* 416 U.S. at 745–746.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
STUART A. SMITH,
Assistant to the Solicitor General.
ERNEST J. BROWN,
ROBERT S. WATKINS,
Attorneys.

MAY 1975.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) [as amended by Sec. 101(f)(1), Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, 524] *In General.*—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * * *

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, Pub. L. 85-866, 72 Stat. 1606, 1665 and Sec. 101(j)(40), Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, 530] *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

* * * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, 530] *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day) the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) [as amended by Sec. 104(a), Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 Stat. 1125, 1135] *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law),

and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 Stat. 1125, 1144] *Tax.*—Except as provided in sections 6212 (a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-744

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS

HERBERT J. MILLER, JR.
NATHAN LEWIN
MARTIN D. MINSKER

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N. W. – Suite 500
Washington, D. C. 20037
(202) 293-6400

Attorneys for Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
1. The Agreement to Surrender for Extradition	3
2. The Sudden IRS Seizure	7
3. Legal Action is Instituted	9
4. Criminal Allegations are Belatedly Made	10
5. The Action is Dismissed	13
6. Proceedings Pending Appeal	15
7. The Decision of the Court of Appeals	17
8. Proceedings After the Court of Appeals Decision	19
INTRODUCTION AND SUMMARY OF ARGUMENT	22
ARGUMENT	26
I. Since the IRS procedures were patently invalid under The Internal Revenue Code, the Anti-Injunction Act does not bar a judicial remedy	26

Page

A. The failure to provide notice to the taxpayer and make a prior demand for payment wipes out the lien and levy collection mechanism utilized by the IRS 26

B. The IRS Actions are unlawful because they were not part of a good-faith effort to collect revenue 35

1. Timing of the assessment 36

2. Affirmative concealment 41

3. General IRS practice 44

II. The Anti-Injunction Act is not violated by requiring the IRS to produce some evidence to support an allegation of continuous criminal activity which is denied under oath by the taxpayer, who produces corroborating evidence 53

CONCLUSION 69

APPENDIX A 1a

APPENDIX B 8a

APPENDIX C 22a

APPENDIX D 24a

APPENDIX E 30a

APPENDIX F 59a

APPENDIX G 64a

CITATIONS

Cases: Page

Aguilar v. Texas,
378 U.S. 108 (1964) 67

Aguilar v. United States,
501 F.2d 127 (5th Cir. 1974) 44, 58

Alexander v. "Americans United", Inc.,
416 U.S. 752 (1974) 19

Bauer v. Foley,
404 F.2d 1215 (2d Cir. 1968), *modified on rehearing*,
408 F.2d 1331 (2d Cir. 1969) 32, 33

Bob Jones University v. Simon,
416 U.S. 725 (1974) 19, 46, 53

Clark v. Campbell,
501 F.2d 108 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3350 (U.S. Dec. 9, 1974) (No. 74-722) 33

Cole v. Cardoza,
441 F.2d 1337 (6th Cir. 1971) 62

Dombrowski v. Pfister,
380 U.S. 479 (1965) 51

Donaldson v. United States,
400 U.S. 517 (1971) 45

Enochs v. Williams Packing Co.,
370 U.S. 1 (1962) 33, 46, 50, 53

Page

Flora v. United States,
362 U.S. 145 (1960) 49, 50

Hamilton v. United States,
309 F. Supp. 468 (S.D.N.Y. 1969), *aff'd.*, 429 F.2d 427 (2d Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 913 (1971) 62

Holdsworth, In re, 113 F. Supp. 878 (D.N.J. 1953) . . . 28

James v. United States,
510 F.2d 860 (6th Cir. 1975) (per curiam) 62

Jones v. United States,
362 U.S. 257 (1960) 68

Laing v. United States,
496 F.2d 853 (2d Cir.), (per curiam), *cert. granted*, 419 U.S. 824 (1974) 29

Lisner v. McCanless,
356 F. Supp. 398 (D. Ariz. 1973) 45

Lucia v. United States,
474 F.2d 565 (5th Cir. 1973) *(en banc)* 58, 64

Miranda v. Arizona,
384 U.S. 436 (1966) 58

Mrizek v. Long,
187 F. Supp. 830 (N.D. Ill., 1959) 29, 32, 34

Pizzarello v. United States,
408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) 58, 64

Page

Rambo v. United States,
492 F.2d 1060 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3017 (U.S. July 10, 1974) (No. 73-2005) 34, 35

Rinieri v. Scanlon,
254 F. Supp. 469 (S.D.N.Y. 1966) 45, 57

Schreck v. United States,
301 F. Supp. 1265 (D. Md. 1969), *reaff'd on reconsideration*, 375 F. Supp. 742 (1973), *appeal docketed*, No. 74-1566, 4th Cir. May 16, 1974 35

Shapiro, In re, 352 F. Supp. 641 (S.D.N.Y.), *on review sub nom. Shapiro v. Ferrandina*, 355 F. Supp. 563 (S.D. N.Y.), *aff'd.*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973) 3

Sherman v. Nash,
488 F.2d 1081 (3d Cir. 1973) 47, 51

Steiner v. Nelson,
259 F.2d 853 (7th Cir. 1958) 27, 32

Trent v. United States,
442 F.2d 405 (6th Cir. 1971) (per curiam) . . 33, 62, 63

United States v. Ball,
326 F.2d 898 (4th Cir. 1964) 28

United States v. Bonaguro,
294 F. Supp. 750 (E.D.N.Y. 1968) 32, 58

United States v. Hall,
493 F.2d 1211 (6th Cir.), *cert. granted*, 419 U.S. 824 (1974) 26

Page

United States v. Harris,
403 U.S. 573 (1971) 67

United States v. United States District Court,
407 U.S. 297 (1972) 56

Willits v. Richardson,
497 F.2d 240 (5th Cir. 1974) 44, 58

Woods v. McKeever,
32 Am. Fed. Tax R.2d 5967 (D. Ariz., 1973), *appeal docketed*, No. 74-1133, 9th Cir. Jan. 25, 1974 45

Younger v. Harris,
401 U.S. 37 (1971) 51

Stautes:

Internal Revenue Code of 1954 (26 U.S.C.):
Sec. 4403 62
Sec. 6203 28
Sec. 6212 . . . . . 26, 49
Sec. 6212(a) 27
Sec. 6213(a) 27, 49, 50, 62
Sec. 6321 28
Sec. 6322 28
Sec. 6331 . . . . . 7, 28
Sec. 6331(a) 29, 36
Sec. 6501 38
Sec. 6851 . . . . . 26, 27
Sec. 6861 . . . . . 27, 33, 44, 47, 48, 50
Sec. 6861(a) 27, 50
Sec. 6861(b) 28, 42
Sec. 7421 . . . . . 26, 50
Sec. 7421(a) 2
Sec. 7454(a) 63

Page

Revenue Act of 1924, Sec. 274(d), 43 Stat. 297 48

Federal Rules of Civil Procedure, Rule 26 39

Miscellaneous:

H.R. Rep. No. 179, 68th Cong., 1st Sess. 7 49

Silver, *Terminating the Taxpayer's Year: How The IRS Uses It Against Narcotics Suspects*, 40 J. Taxation 110 (1974) 45, 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-744

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

SAMUEL SHAPIRO AND BELLA SHAPIRO

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the district court (Pet. App. A, 1A-2A), and its oral opinions of December 13, 1973, granting a temporary restraining order (App. 64-68),[1] and of December 21, 1973, denying a preliminary injunction and dismissing the complaint (App. 152-155), are not reported. The

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[1] "App." refers to the Appendix filed in this Court. "CA App." refers to the Appendix filed in the Court of Appeals.

opinion of the court of appeals (Pet. App. B, 3A-17A) is reported at 499 F.2d 527.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Anti-Injunction Act (26 U.S.C. §7421(a)) prevents a district court from enjoining the Internal Revenue Service's seizure of all of a foreign citizen's assets in the United States where the seizure is deliberately made (a) without the prescribed statutory notice, (b) for law-enforcement purposes unrelated to revenue collection, and (c) at a time when the taxpayer would be effectively prevented from challenging the factual basis for the asserted tax liability underlying the seizure.

2. Whether a district court is prohibited by the Anti-Injunction Act from directing the Internal Revenue Service to produce some facts, under oath, to justify a seizure of all of a taxpayer's assets based on an allegation of continuous criminal activity where the taxpayer has denied the criminal activity under oath and has explained, in his own affidavit and that of a supporting witness, where he lawfully obtained the funds alleged by the IRS to have been derived from unlawful activity.

STATUTES INVOLVED

The relevant statutes appear in the Appendix to the government's brief (pp. 37-40).

STATEMENT

1. The Agreement to Surrender for Extradition[2]

Samuel Shapiro is an Israeli citizen who lived openly in the United States between late 1970 and May 1974. He is married to the other plaintiff in this action, who is a native citizen of the United States. In November 1972, the State of Israel requested Mr. Shapiro's extradition to face charges in Tel Aviv District Court of conspiracy and having taken money by false pretenses.[3] Mr. Shapiro's extraditability was thereafter litigated in the Southern District of New York and in the Court of Appeals for the Second Circuit.[4] Throughout the course of these extradition proceedings – and throughout the course of the later negotiations entered into among Mr. Shapiro's counsel, the Department of Justice, the Department of State, and the State of Israel, as set forth hereinafter – Mr. Shapiro was required to post funds presently within the United States in banks as security for his appearance.

---

[2] Most of these background facts are alleged in the verified complaint instituting their action (App. 8-15). In reciting them below, however, we make reference to the more complete Appendix filed with the court of appeals.

[3] The charges grew out of an investment company operated by Mr. Shapiro and a partner in Israel. It was alleged that the partners had represented to investors that their investment company was a bank. The company was unable to repay investors, who suffered, according to the Israeli indictment, a total loss of about $55,000.

[4] See *In re Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973); *Shapiro v. Ferrandina*, 355 F. Supp. 563 (S.D.N.Y. 1973); *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973).

After the decision of the court of appeals which found for Mr. Shapiro on some issues but held him extraditable, a petition for certiorari was filed with this Court. It was docketed as No. 72-1701.[5] Discussions between counsel for Mr. Shapiro and representatives of the Department of State were then had to seek to effectuate an agreeable resolution of the request for extradition under which Mr. Shapiro would surrender voluntarily and return to Israel to stand trial. It was explained to attorneys of the Department of State that Mr. Shapiro was confident that he would be acquitted but was concerned that his departure for Israel would affect the health of his wife, who was then expecting the couple's first baby and that the Israeli Government might refuse to release him on bail for an extended period until his trial was held.[6]

With the agreement of Mr. Shapiro's counsel, attorneys for the Office of the Legal Adviser of the Department of State communicated with the Embassy of Israel to see whether the case could be amicably resolved under these conditions. A Diplomatic Note dated August 16, 1973, was delivered to the Embassy of Israel asking whether it would approve of these conditions (CA App. 201-202).[7]

[5] This Court refused, at that juncture, to stay the extradition pending decision on the petition, but the Department of State did not attempt to have Mr. Shapiro extradited immediately.

[6] Mr. Shapiro is the nephew of a deceased Minister of the Interior, whose party (the National Religious Party) has been subjected to vicious criticism by a vociferous political party that publishes a weekly scandal-sheet (*Haolam Hazeh*). The sheet featured many biased and unfair stories about Mr. Shapiro and demanded his return and imprisonment.

[7] The note stated that the petition for certiorari (then pending) would not be acted upon until October, and possibly not until January. It went on to say (CA App. 201-202):

(cont'd)

On September 4, 1973, the Embassy of Israel replied to the request by agreeing to three conditions in exchange for the withdrawal of the petition for a writ of certiorari and the voluntary surrender of Mr. Shapiro. The three conditions were that extradition would be delayed until after the birth of Mr. Shapiro's child and the religious ceremonies incident thereto, that Mr. Shapiro would "be allowed to remain at-large in Israel until acquittal or conviction," and that the trial in Israel would not be interrupted by extended delays.[8] On September 21, 1973, in answer to a letter sent directly to the Attorney General of Israel, Mr. Shapiro's lawyer was told that Mr. Shapiro

(Footnote 7 cont'd)

> In addition, Mr. Lewin [Shapiro's counsel] has indicated that he will initiate a second lawsuit if the Secretary signs a warrant of surrender in this case. This second suit will seek an injunction and will raise questions regarding the procedure followed within the Department when an extradition magistrate has found a person extraditable. Mr. Lewin believes that such a person must be granted a new hearing within the Department and an opportunity to present oral and written arguments.
>
> The Department does not believe that Mr. Lewin presents a strong case. However, the Department would rather not be subjected to a lawsuit. If this can be avoided.
>
> All of this litigation may delay Mr. Shapiro's extradition indefinitely. The Department therefore forwards Mr. Lewin's letters with the hope that all litigation in the United States will cease if the Government of Israel can respond favorably to Mr. Lewin's request.

[8] CA App. 267. The quote is from the State Department's letter of September 19, 1973, to Mr. Shapiro's counsel.

would be released on bail of 250,000 Israeli pounds (approximately $60,000) when he returned to Israel (CA App. 213).

On the basis of the representation made to him and the request by the Department of State that he take steps immediately to withdraw the petition for writ of certiorari (CA App. 268), Mr. Shapiro's counsel drafted and submitted for signature by the Solicitor General a stipulation later signed by the Solicitor General for the United States and by Mr. Shapiro's counsel, withdrawing the petition (CA App. 269).

On November 16, 1973, pursuant to the agreement among counsel and with the Government of Israel, Mr. Shapiro's attorney notified the Department of State that a daughter had been born to Mr. and Mrs. Shapiro. Thereafter, as the result of many discussions over several days with representatives of the Department of State, the Department of Justice, and the Government of Israel, it was agreed that Mr. Shapiro would voluntarily surrender for extradition to Israel on Sunday, December 9, 1973. Arrangements were made for the surrender date with the Government of Israel and with the Department of Justice, which assigned a Deputy United States Marshal to be at the United States Courthouse on that day officially to surrender Mr. Shapiro to an agent of the Government of Israel.

During the course of these discussions, Mr. Shapiro's counsel made clear that in order to post the bail required by the State of Israel, Mr. Shapiro would have to utilize the funds currently pledged as security for his appearances in the proceedings before the Immigration and Naturalization Service and the district court. At the suggestion of an official of the Embassy of Israel, arrangements were

made with an Israeli Bank – Bank Leumi – to have these funds deposited, on their release by U.S. authorities, in the New York branch of Bank Leumi as partial security for that Bank's guarantee in Israel of the bail to be posted upon Mr. Shapiro's return to that country. In a letter dated November 27, 1973, Mr. Shapiro's counsel made reference to the need to use the bond security for bail in Israel (CA App. 238).

Pursuant to these arrangements, Mr. Shapiro and acquaintances arranged that upon his surrender for extradition, assets he had in the United States, including bank accounts which had been posted as security insuring his appearance in judicial proceedings and proceedings before the Immigration and Naturalization Service, would be deposited with the offices of Bank Leumi.

2. The Sudden IRS Seizure

On the afternoon of Thursday, December 6, 1973, without any prior notice or warning whatever, agents of the Commissioner of the Internal Revenue served on banks in New York where Mr. Shapiro maintains accounts and safety deposit "Notices of Levy" pursuant to Section 6331 of the Internal Revenue Code (App. 22-29). No notification of the levies was given Mr. Shapiro nor were copies of the levies provided until several days later, when his counsel appeared in New York at a meeting with the IRS agents.[9] The notices recited that assessment had been made on that same day. During the entire extradition litigation, there

---

[9] Mr. Shapiro learned of the levies only because one of the banks, as a courtesy, telephoned him and told him that it had been served with these papers.

had been not the slightest suggestion that Mr. Shapiro was subject to any tax liability or that his tax returns were being investigated.

The IRS agents knew, prior to the service of these Notices, that Mr. Shapiro was the subject of extradition proceedings and was to be surrendered to the State of Israel on December 9, 1973 (App. 129-130). The agents also could have learned with minimum effort that the levied funds were, at the time of levy, being utilized by Mr. Shapiro as security for his bonds in the United States and that he planned to use the funds for security in Israel.

On December 6, 1973, and on Friday, December 7, 1973, Mr. Shapiro's counsel spoke to representatives of the Department of Justice and the Department of State and set forth his views, *inter alia*, that the intervening actions of the IRS violated the agreements concluded pursuant to which Mr. Shapiro had agreed to surrender his right further to litigate the matter of extradition and constituted gross bad faith on the part of the government of the United States (App. 12-13).

Officials of both Departments advised counsel that they had no prior notice of the actions of the IRS and they were "surprised" or "shocked" by these actions. On December 7, 1973, the State Department informed counsel that as a result of the intervening actions of the IRS, the Israeli Government was prepared to postpone the extradition of Mr. Shapiro until Sunday, December 16, 1973, in order to give Mr. Shapiro an opportunity to resolve this matter with the IRS (App. 13).

Mr. Shapiro's counsel met on Monday, December 10, 1973, in New York City with three agents of the Internal Revenue Service to ascertain the basis for the IRS claim

and discuss a possible resolution of the matter. Despite repeated requests, counsel was unable to ascertain from these agents the basis for the IRS claim of taxes due. Counsel proposed to these agents that an agreement be entered into whereby the funds presently under levy (approximately $35,000) be deposited in the New York branch of Bank Leumi as partial security for that bank's guarantee in Israel of Mr. Shapiro's bond, with the United States to have a security interest in those funds second only to the State of Israel. Counsel was directed to embody this proposal in a letter. Pursuant to this instruction, the letter attached to the Complaint as Exhibit IV (CA App. 272-76) was sent air mail, special delivery, to Mr. Victor Godfrey, District Director of Internal Revenue. Appendix D, pp. 24a-29a, *infra*.

On December 12, 1973, counsel had delivered by hand a copy of this letter to the State Department along with a cover letter dated December 12, 1973, and attached to the Complaint as Exhibit V (CA App. 277-78). Counsel therein requested a further delay of the extradition until the IRS responded to the proposal and, if it was refused, until the judicial resolution of the tax liability. Counsel was subsequently informed by the State Department that extradition would not be postponed.

3. Legal Action is Instituted

This action was begun on December 13, 1973, to challenge the combined action of governmental officials who had, as of that date, arranged for Mr. Shapiro's imminent forced departure and had, at the same time (through another agency of the government) summarily seized all his assets. The complaint alleged that these acts had unconstitutionally deprived Mr. Shapiro of the right to contest the tax

liability and that the delay until just before his extradition "was a deliberate means of preventing him from asserting defenses to the tax claim and denying him assistance of counsel in any proceeding relating thereto" (App. 14). It was also alleged that the acts of the IRS had violated "the express and implied promise of the United States not to interfere with [Mr. Shapiro's] release on bail" (App. 15). It was finally alleged that the effect of the defendants' actions was to leave Mrs. Shapiro with an infant whom she would be unable to support, all of which constituted a violation of both plaintiffs' Fifth Amendment rights (App. 15). The complaint asked that the Notices of Levy be lifted or, alternatively, that the Attorney General and Secretary of State be enjoined from carrying out Mr. Shapiro's extradition until the matter of the tax liability was adjudicated (App. 15-16).

A hearing on the application for a temporary restraining order was held before Judge Richey on the afternoon of December 13, 1973.[10] At the conclusion of that hearing Judge Richey entered a temporary restraining order and set a further hearing for December 19, 1973 (App. 64-70).

4. Criminal Allegations are Belatedly Made

During all this time, the government was refusing to disclose what the basis was for its tax claim against Mr. Shapiro. At the hearing of December 13, the district court specifically inquired as to the basis for the levies in this case (App. 38):

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[10] The transcript of the hearing is reproduced at App. 30-70.

THE COURT: Can you tell me the bases for a levy?

MR. FUERTH: For a levy or for an assessment sir?

THE COURT: Well, for a levy and assessment here.

MR. FUERTH: The basis for an assessment is that there was unreported income in the years 1970 and 1971, income that was not reported on his return.

THE COURT: Do you have any evidence that you can present to the Court to verify that?

MR. FUERTH: No, Your Honor, not today.

Your Honor, if I may suggest – and I am prepared to make an argument on that – I would suggest, Your Honor, that this Court lacks the necessary jurisdiction to question the merits of either the assessment or the making of the jeopardy assessment.

And, at the same hearing, the IRS implied it intended to take the full sixty days allowed it under Section 6861(b) before issuing the required Notice of Deficiency (App. 39).

Mr. Shapiro's counsel served interrogatories on December 17, 1973, which asked, *inter alia,* "the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro" (App. 74). When the government declined to respond prior to the hearing scheduled for December 19, 1973, counsel moved to shorten the allowed time for a response (CA App. 279-281). A hearing on this motion was held on December 18, 1973 (App. 77-90), at which the court ordered that "the government shall be required to answer such interrogatories before tomorrow, orally or in writing, as reasonable and diligent effort may provide" (App. 86).

The government's answers, served on December 19, 1973, objected to the interrogatory requesting the amount of the deficiency (App. 131):

> This interrogatory is objected to on the grounds that the statutory notice of deficiency is pursuant to the provisions of Section 6861(b) not required to be sent to the plaintiff, Samuel Shapiro, until February 4, 1974, and does not presently exist, and further objects on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such, the information sought herein is irrelevant and immaterial to the matters presently before the Court.

At the December 19th hearing on the motion for a preliminary injunction – as during the earlier hearing – the government insisted that it had until February 4, 1974, to serve its notice of deficiency stating its ground, and Mr. Shapiro could then challenge that deficiency in the Tax Court (App. 110, 115). The district court took the matter under advisement, continuing the restraining order until it would rule on the preliminary injunction motion, which, Judge Richey said, he could do on the next day (December 20, 1973) (App. 127).

On December 20, 1973, Judge Richey advised the parties that he would issue his decision on December 21 at 3:00 p.m. At 12:20 p.m. on December 21, Mr. Shapiro's counsel was served with a supplement to the earlier answers to interrogatories to which were attached copies of Notices of Deficiency for the tax years 1970 and 1971 (App. 132-136). The deficiency alleged therein for the income tax year 1970 was $5,137.89, based on "unexplained

bank deposits at the 1st National City Bank in the amount of $18,000.00" (App. 135). The deficiency alleged for the 1971 tax year was "unreported taxable income in the amount of $137,280.00 . . . from your activities as a dealer in narcotics . . ." (App. 136). The only further explanation for the income figure was the assertion that Mr. Shapiro realized $381,680.00 in gross income from hashish sales during the year 1971. Mr. Shapiro's flat denial of the charge that he was a narcotics dealer was reported to the district court at the hearing held on the afternoon of December 21 (App. 138).

At the hearing, Mr. Shapiro's counsel pointed out that the government's last-minute allegation of illegal narcotics activity made it all the more essential that he be permitted to remain here to contest the tax claim and any criminal charge that should be filed if the government was serious in its allegation. The government's response, once again, was that the court "lacked jurisdiction" (App. 140).

5. The Action is Dismissed

After more argument, Judge Richey announced that he had "with reluctance" and "with some difficulty," come to the conclusion that the court lacked jurisdiction (App. 153). Regarding the extradition, the court ruled it lacked jurisdiction because Mr. Shapiro's extraditability had been decided in the Southern District of New York and by the Court of Appeals for the Second Circuit, and jurisdiction over the U.S. Marshal in New York was lacking. Regarding the jeopardy assessments, the court ruled (App. 154-155):

> I want to say here and now, in view of what the Court has learned today, that the Government was aware from the time this

suit was filed and prior thereto, that there was a claim for these back taxes based on illegal trafficking in narcotic drugs, in this case hashish.

For the like of me, I cannot understand why that was not made known, although perhaps the Government was under no obligation to do so.

* * *

I think upon careful consideration, upon all the facts in the entire record, that this case does not amount to a violation of due process. It does not fly in the face of the Enoch standard as claimed by able counsel for plaintiff.

* * *

While the Government would preferably have made known the basis for its claim, I don't think that it is necessarily fatal or tantamount to a denial of due process for its failure to disclose such a basis for its assessment before now or until February 4th, at least.

So we come down to the fundamental question, as the Court has indicated, as to whether the Court has jurisdiction; and the Court finds that it does not.

As to the due process claim of the plaintiffs, the Court will say this: The standard is whether the Government has a chance of

ultimately prevailing on the basis of the information available to it and available to the Court. And only if it is apparent under the most liberal view of the law and the facts that the United States cannot establish its claim, may a suit for an injunction be maintained.

Now, that is a principle of law laid down in Enoch; and I just don't find and cannot find, as much as I really do not like the activity of the Government in this case – I will tell you frankly I don't, because I think this could have been at least disclosed at the time or some opposition be made before this man's departure – but, nevertheless, looking at it from the most liberal point of view and in the most liberal light as to the law and facts in favor of the plaintiff, I don't see how the Government can fail to establish its claim; and I think the suit for injunction and the other relief must be denied.

That means that the Court is without jurisdiction and the preliminary injunction will be denied.

6. Proceedings Pending Appeal

The court of appeals granted an Emergency Application for a Continuation of Judge Richey's original order on December 26, 1973. On January 3, 1974, Mr. Shapiro filed in Tax Court for a redetermination of the deficiencies alleged by the IRS. *Shapiro v. Commissioner*, No. 178-74 (App. 161-162). Although the Tax Court petition

was short and directly challenged the IRS, no answer or responsive pleading was filed until the full 60-day period for a responsive pleading elapsed. In order further to expedite resolution of this case, Mr. Shapiro's counsel had the record in the court of appeals docketed long before the 40 days authorized by the Federal Rules of Appellate Procedure.

There the matter sat – awaiting timely briefing and argument in the court of appeals – until, on February 21, 1974, the government filed in the court of appeals a motion to vacate the stay order, alleging that any delay in Mr. Shapiro's extradition was "exacerbating the situation relative to the United States' discharge of its treaty obligations to Israel." Attached to the motion was an affidavit by a State Department official saying that Israel was "concerned by the present delay" in Mr. Shapiro's extradition and a copy of a note from the Israeli embassy stating that it had "acted on the recommendations and advice offered by the Department of State" in this matter and that it "would greatly appreciate it if the department were now to ensure that this matter is brought to a close."[11]

The court of appeals thereupon issued an "oral communication" indicating that it would extend the stay for an additional ten days to allow for further negotiation with Israel "in light of the IRS's actions of December 6, 1973." On the day following that communication, Mr. Shapiro's counsel submitted to the Israeli Government, pursuant to a meeting with attorneys representing the Departments of

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[11] The government did not explain to the court of appeals why if the matter was of such great urgency, it had waited twelve days since receipt of the note (stamped in on January 9) to submit it to the court.

Justice (Criminal Division, Tax Division and Office of the United States Attorney) and State, three distinct proposals whereby its interest in prompt extradition could be reconciled with the still undetailed claims of the IRS (CA App. 303-305; see Appendix G, pp. 64a-67a, *infra*). Israel unconditionally rejected all proposals. Accordingly, on February 12, 1974, the court of appeals lifted the stay it had previously entered and set the case for oral argument on March 1, 1974. An application for a further stay filed with this Court was held without decision until the court of appeals resolved the appeal, when it was dismissed as moot. October Term 1973, No. A-788.

7. The Decision of the Court of Appeals

The court of appeals, in a unanimous opinion issued on May 15, 1974, held first that there was no jurisdiction to enjoin the extradition (Pet. App. 6A-7A). With respect to the jeopardy assessment, it held that dismissal of the action was "premature," and that Mr. Shapiro should be given an opportunity to establish the factual basis for his claim (Pet. App. 7A). The court ruled that a taxpayer is entitled to enjoin IRS action when it is, in fact, an "exaction in the guise of a tax" (Pet. App. 10A). Citing decisions of the Second and Fifth Circuits that had permitted injunctions against IRS collection procedures based on tax claims that are "entirely excessive, arbitrary, capricious, and without factual foundation," the court held that the complaint, fairly construed (in light of its having been filed *before* the allegation of criminal activity was made), amounted to a denial of the charge and a claim that the IRS' liability was arbitrary and excessive (Pet. App. 12A).

Consequently, said the court of appeals, the district judge "might have allowed Shapiro an opportunity to discover more evidence, or he could have compelled the Commissioner to provide factual support for the asserted deficiency" (Pet. App. 13A). The court concluded that "at the very least the District Court must obtain some evidence by which to judge whether the asserted deficiency was a tax or was so arbitrary and excessive as to be 'an exaction in the guise of a tax' " (Pet. App. 16A). The case was remanded for further proceedings on this factual issue. Also available on remand was the question raised by the court in footnote 12 of its opinion – whether the tax levies were valid in light of the IRS's failure to provide prior notice and demand for payment of taxes due (Pet. App. 8A-9A). Nowhere in its opinion – either expressly or impliedly – did the court of appeals endorse the proposition which the government has stated as the "Question Presented" in this case – *i.e.*, that "the Commissioner of Internal Revenue is required to prove the facts upon which a tax assessment is based before the bar of the Anti-Injunction Act is applicable" (Petition for Certiorari, p. 2; Brief for the Petitioner, p. 2).

Several days after the court's decision, Mr. Shapiro surrendered and was extradited to Israel. We have been advised that on his arrival there, the requested bail was reduced (notwithstanding the earlier refusal to make this accommodation), and that an Israeli relative offered to post an apartment as partial security for his appearance. Consequently, he was released on bail. We have also been told that as of this date – some 18 months after his return was again urgently requested by the Israeli Government – Mr. Shapiro has still not been put to trial, nor has Israel taken any formal steps directed at a trial on the criminal charges.

8. Proceedings After the Court of Appeals Decision[12]

On May 29, 1974, the government filed a petition for rehearing with the court of appeals in which it argued, in substance, that the court of appeals' decision conflicted with this Court's then-recent rulings in *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974). The court of appeals denied that petition on July 17, 1974. The government then requested a stay of the mandate, asserting that "serious consideration" was being given to the filing of a petition for writ of certiorari. On August 12, 1974, the court of appeals denied the request for a stay. Similar relief was thereafter sought in the district court, and it was substantially denied on September 19, 1974.

Unaware that the government had filed a petition for rehearing on May 29 (the day the mandate was to issue on the original decision of the court of appeals), Mr. Shapiro's counsel served, on that day, a motion for summary judgment in the district court entirely on the ground discussed in footnote 12 of the court of appeals' opinion – *i.e.*, that the failure to provide notice and make a demand for payment totally invalidated the IRS levy. Appendix A, pp. 1a-7a, *infra*. This motion was held by the district court until the mandate of the court of appeals had issued.

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[12] These proceedings are obviously not a part of the record here on certiorari. However, the government's petition and brief dwells on them at great length. Consequently, we are providing our own account to give the Court the entire picture and as a basis for our own argument.

Thereafter, the district court ordered that a response to the motion be filed on or before October 10, 1974.[13]

In response to the motion for summary judgment, the government asserted that it had mailed notices and demand for payment on December 6, 1973 – the very same day on which it served notice of levy on Mr. Shapiro's banks. Appendix B, pp. 8a-21a, *infra*. The government thereupon admitted that the levies "may be technically defective," but argued that the assessments were properly made and that new notices of levy would be promptly served to remedy the defect.

Attached to the government's response was an affidavit from the Director of The Brookhaven Service Center of the IRS stating that "the official records" showed that on December 6, 1973, Treasury Forms 17-A "were mailed to Samuel Shapiro giving him notice of and making demand for payment of said jeopardy assessments." The affidavit did *not* explain:

(1) Why Mr. Shapiro had never received any such notices;

(2) Why the photostated copy attached to the affidavit and purportedly taken from the IRS file *was the taxpayer's copy*, marked as the one to be retained by the taxpayer for his own records;

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[13] The order provided – at respondent's suggestion – that if the Solicitor General advised the district court by October 1, 1974, that he intended to file a petition for certiorari in this Court, all proceedings would be stayed. No notice to that effect was issued or received; consequently, no stay took effect. If the court of appeals' decision was so clearly wrong and so clearly harmful, one wonders why this opportunity to obtain an automatic stay was missed.

(3) How the cryptic form, if it had ever been received, was to be understood by the taxpayer as a meaningful demand.

On October 11, 1974, new levies were served on five banks where Mr. Shapiro had had assets. On October 29, 1974, the court denied the motion for summary judgment as "moot" because "the government has effected a second set of levies upon Plaintiffs' assets." Appendix C, pp. 22a-23a, *infra*. The district court simultaneously ordered the government to file with the court

> The factual submission upon which the government seeks to rely as providing a factual foundation that Plaintiff Shapiro was a narcotics dealer and that the government's calculations of the deficiency has a rational basis, so that the Court can determine if the claim is "entirely excessive, arbitrary, capricious, and without factual foundation."

A "factual submission" was submitted, pursuant to court order, on November 8, 1974. It consisted of a revenue agent's affidavit which asserted various undisputed facts – such as that Mr. Shapiro had filed no tax return for 1970 but had filed a return for 1971, that he had certain bank accounts with certain amounts on deposit, and that he had purchased an automobile and a home. The critical paragraphs of the affidavit then stated that "information supplied to the Internal Revenue Service indicated" that Mr. Shapiro had smuggled hashish into the United States in 1971 and that an unnamed individual, of unknown reliability, who had been convicted of selling hashish stated that he had made six deposits to Mr. Shapiro's account at irregular occasions between mid-April and mid-August 1971, in a total amount of $14,900, and that these "transfers"

were for hashish. The affidavit then went on to say that the "known practice in hashish trafficking" was to deal in full kilos, that the wholesale cost per kilo in 1971 was approximately $2350, and that the "common practice" was for hashish dealers "to receive payment in two parts – the first for cost and the second for profit." There was no explanation as to how the six irregular payments – in amounts varying from $1500 to $5600 – fit into this "common practice" or coincided with the known wholesale cost.

At a hearing on November 12, Mr. Shapiro's counsel submitted additional documentation explaining the source of funds used by the respondent in the United States. The court indicated that the anonymous references in the affidavit were inadequate, and that the informant would have to be further identified or examined. There had also been no rational explanation of the IRS' total extrapolation for a full year's alleged narcotics sales. The government thereafter advised the court that it would submit no further information. Judge Richey did not, however, enter judgment for the respondent. Instead, he issued an order on December 18, 1974, governing further discovery in the case. (Br. in Opp. App. C, 3a-4a).

On January 3, 1975, after the government's petition for certiorari had been filed in this Court, the court of appeals stayed all further proceedings and directed that the certified copy of its judgment be returned.

INTRODUCTION AND SUMMARY OF ARGUMENT

On its own facts, this case does not present the broad issue the government has brought here. Nor does it even necessitate resolving the question which the court of appeals

addressed squarely – and decided consistently with considered rulings of the Second and Fifth Circuits. The proceedings that followed the decision of the court of appeals demonstrated unequivocally that the IRS has moved in an unlawful manner against the assets held by Mr. Shapiro in the United States. Consequently, this Court may affirm the judgment below merely because the assessment and levy procedures were so clearly invalid under the governing statutes that the seizure of Mr. Shapiro's assets should be vacated by the district court. At the very least, enough of a showing has been made to warrant consideration of this issue.

If the Court goes beyond this most narrow ground for decision, it must sustain the judgment below because there is more than ample proof in the record that the objective of the IRS in seizing Mr. Shapiro's assets was not tax collection or preserving revenue. The Anti-Injunction Act was not designed to give the Commissioner roving powers to harass, in a manner that would be unconstitutional if done by any other government official, those whom he or his subordinates believe have committed crimes.

In our Argument, we present our contentions relating to the absence of notice and demand and to the bad-faith character of the jeopardy assessment before turning to the broader issue tendered by the decision below and by the "Question Presented" in the government's briefs. We do so because we believe that the facts of this case are so extreme and demonstrate so cavalier a disregard of taxpayers' rights by the IRS that this court should not accept the government's invitation to treat it as an ordinary revenue-collection matter in which the Commissioner is being asked to make unnecessary disclosures that Congress wished to keep out of the courts. Thus, we first urge on the Court the most limited grounds of decision.

If, however, the Court were to disagree with our evaluation of the conduct of the Internal Revenue Service and were to conclude that it should consider whether the Anti-Injunction Act permits district judges to entertain challenges to jeopardy assessments which are squarely controverted by taxpayers who claim that they are factually baseless and arbitrary, we argue below that no standard lower than that applied by the court of appeals is correct. Where the effect of a seizure pursuant to a jeopardy assessment is as devastating as it is here (*i.e.*, where it involves an individual who is about to be forced out of the United States, perhaps forever), where the assessment rests entirely on an allegation of criminal activity, where the taxpayer's *total* available assets are seized, and where the alleged criminality is squarely denied under oath by the taxpayer (who also provides other corroborative proof), there is reason to be concerned that the government is obtaining an "exaction in the guise of a tax." If the Anti-Injunction Act is read to foreclose judicial scrutiny at this juncture, it is subject to grave constitutional doubts. For the effect of a rule that forces such a taxpayer to surrender all his funds and leave the United States on a totally unsubstantiated charge of criminal activity is to forfeit his property without the process of law that is due him under the Fifth Amendment.

Neither we nor the court of appeals maintain that, even in such extreme circumstances, the Commissioner must establish by a preponderance of the evidence that his facts are true. But we do believe that if the Fourth Amendment protects "papers and effects" against government seizure by a criminal investigator or prosecutor on less than probable cause, the Internal Revenue Service – whose statutory functions are primarily civil and whose operations are limited to revenue collection – can claim no

greater right to unsubstantiated and *ex parte* appropriations. If the government wished to secure from Mr. Shapiro a piece of physical evidence or a document evidencing his alleged criminal activity in order to prevent its being removed from the United States, it would have to prove much more than it did with the meager affidavit that the revenue agent submitted on November 12, 1974. It makes no sense whatever to permit the government to seize all of Mr. Shapiro's valuable assets on an *ex parte* conclusion of continuing illegality, when it may not seize a single "paper" or "effect" on less than probable cause.

The standard used by the court of appeals may not even amount to probable cause. Contrary to the repeated assertions of the government, no ultimate burden of proof was cast upon the IRS. The *sole* issue to be resolved on remand under the court of appeals' mandate is whether the IRS action was arbitrary and excessive and "whether there are any facts from which good faith may be inferred" (Pet. App. 16A). We believe this standard is too generous to the government in light of the Fourth Amendment rule. At all events, we surely cannot see how anything less can be demanded if we are to live under a rule of law, not under a system whereby totally unsupervised official judgments are given binding effect.

ARGUMENT

I

SINCE THE IRS PROCEDURES WERE PATENTLY INVALID UNDER THE INTERNAL REVENUE CODE, THE ANTI-INJUNCTION ACT DOES NOT BAR A JUDICIAL REMEDY

A. The failure to provide notice to the taxpayer and make a prior demand for payment wipes out the lien and levy collection mechanism utilized by the IRS.

In *United States v. Hall*, No. 74-75, and *Laing v. United States*, No. 73-1808, restored to the calendar for reargument, this Court is considering the question whether the IRS must issue a notice of deficiency to a taxpayer whose tax year is terminated by the Commissioner pursuant to Section 6851 of the Internal Revenue Code. Courts have divided on that question, and their differences have centered on the interpretation to be given to Section 6851. The government argues in its joint brief in those cases that a district court may not, under the Anti-Injunction Act, enjoin collection of taxes pursuant to a Section 6851 termination where no deficiency notice is issued "because the Commissioner is not required to issue such a notice after his termination of a taxable year under Section 6851 "(Brief for The United States, Nos. 74-75 and 73-1808, p. 14). It appears to be conceded, however, that if Section 6851 did require the issuance of such a notice, the Anti-Injunction Act would not be a bar to a suit based upon the IRS' failure to follow the statutory procedure.

This conclusion is, of course, mandated by the prefatory exception to the Anti-Injunction Act. Section 7421 begins with the words, "Except as provided in Sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1). . . ." Section 6212, in turn, authorizes the sending of a deficiency notice and

prohibits additional deficiencies, after such a notice is mailed. The last sentence of Section 6213(a) – more directly in point here – permits the bringing of an injunction action against an assessment or levy, "[n]otwithstanding the provisions of section 7421(a)," before a deficiency notice has been mailed and the time for petitioning in the Tax Court has expired (or while the case is *sub judice* in the Tax Court). During this period, in an ordinary tax case, the Commissioner may not assess or collect pursuant to levy.

The exception to this flat prohibition that appears in the beginning of the second sentence of Section 6213(a) is "[e]xcept as otherwise provided in section 6861 . . . " only when and if the procedure provided in Section 6861 has been followed may assessment and collection occur before there has been service of a notice of deficiency and an opportunity to challenge that deficiency. If the statute's conditions are not satisfied – as is true with Section 6851 collections – assessment and collection may be enjoined notwithstanding the Anti-Injunction Act.

This brings us to the requirements of Section 6861, under which the Commissioner purported to act here. Subsection (a) authorizes the Commissioner to act when he "believes that the assessment or collection of a deficiency . . . will be jeopardized by delay. . . ." If he has such a belief, he may "immediately assess such deficiency . . . *and notice and demand shall be made* by the Secretary or his delegate for the payment thereof" (emphasis added).

The "notice and demand" specified in Section 6861(a) has been held to be a condition precedent to a valid assessment. See *Steiner v. Nelson*, 259 F.2d 853, 858 (7th Cir. 1958). And the "notice" of such an assessment is not to be confused with the Notice of Deficiency required by Section 6212(a) (which is separately provided for in Section

6861(b)). See *United States v. Ball*, 326 F.2d 898, 901 (4th Cir. 1964).

An "assessment" is ordinarily nothing more than the recording of a taxpayer's liability in the records of the IRS. See 26 U.S.C. § 6203.[14] In the ordinary case, "notice and demand" for a tax is made shortly *after* an "assessment." A "jeopardy assessment" differs from the usual case only in the summary manner in which assessments and the "notice and demand" for payment of the tax may be issued. There is no provision in the Internal Revenue Code that otherwise exempts "jeopardy assessments" made under Section 6861 from the usual lien and levy procedures prescribed by the Code.

Section 6321, which sets out the preconditions for a valid tax lien, provides that a lien is to arise in favor of the United States "[i]f any person liable to pay any tax neglects or refuses to pay the same *after demand* . . ." (emphasis added). While Section 6322 also specifies that the lien arises "at the time the assessment is made," the effect of the two sections is to impose a *pair* of preconditions that must be met if the lien is to be valid, "The lien arises only upon the fulfillment of these conditions." *In re Holdsworth*, 113 F. Supp. 878, 879 (D.N.J., 1953).

The "levy and distraint" section – Section 6331 – similarly fixes conditions precedent for lawful seizure of a taxpayer's property. It states that "[i]f any person liable to pay any tax neglects or refuses to pay the same *within 10 days after notice*

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14 "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. . . ."

and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . ." (emphasis added). The concluding sentence of subsection (a) specifies that in instances of jeopardy, "notice and demand for immediate payment of such tax may be made by the Secretary or his delgate and, *upon failure or refusal to pay such tax*, collection thereof by levy shall be lawful without regard to the 10-day period provided in the section " (emphasis added).

In this case, there is substantial doubt whether "notice and demand" was ever made of Mr. Shapiro. He denied having received the Treasury Form 17-A which was allegedly sent on December 6, 1973, and the fact that *his* copy was in IRS files corroborated his claim that no such document was sent to him. Moreover, even the form contained in the file did not request *immediate* payment, as authorized by Section 6331(a). The legend on the bottom left-hand side of the form (Appendix B, p. 12a, *infra*) read (emphasis added):

> This bill is for additional Federal tax due, based on an audit of your tax return for the period shown. Please pay the amount shown as "Balance due" *within 10 days* from the date of this notice.

As is true of the other related provisions of the Code, Section 6331(a) establishes an inflexible precondition:

> A levy is authorized only when a taxpayer "neglects or refuses" (after 10-day notice and demand), or upon "failure or refusal" (after jeopardy finding, notice and demand), to pay any tax for which he is liable.

Mrizek v. Long, 187 F. Supp. 830, 835 (N.D. Ill., 1959).

The verified complaint in this case was entirely clear on the matter of lack of notice and demand. See App. 11-12 (emphasis added):

> On December 6, 1973, *without any prior notice or warning whatever*, agents of the Commissioner of the Internal Revenue served on banks in New York where the plaintiff maintains accounts and safety deposit boxes and, on information and belief, on all institutions where his assets may be located, Notices of Levy pursuant to the jeopardy assessment provisions of § 6861 of the Internal Revenue Code. After several hours of seeking to discover on the telephone precisely what the nature of these liens was, plaintiff's counsel was informed at approximately 5:15 p.m. by Mr. Edward Hanley, a group manager with the Office of the District Director of Internal Revenue for Manhatten that the jeopardy assessments claimed liabilities of $6,843 for 1970 and a figure in excess of $83,000 in 1971.

This allegation, even if it stood alone, warranted the court of appeals' remand to the district court, and it now necessitates a lifting of the levy and assessment.

The IRS conceded in its response to respondent's motion for summary judgment that the levies served on December 6, 1973 were defective (Appendix B, p. 8a, *infra*):

> As can be seen from the affidavit attached hereto as Exhibit A, notice of and demand for payment of the jeopardy assessments was made on December 6, 1973. The records of the Internal Revenue Service apparently do not reflect at precisely what time the notices and demand for payment of the jeopardy assessments were placed into the United States

> mails. Thus, although the notices and demand were made and the levies served, all within a few hours of each event, we are unable to ascertain whether the notices and demand were given before, contemporaneously with, or after the service of the levies. *Accordingly, the Commissioner of the Internal Revenue Service, is now willing to concede that the levies served on December 6, 1973, were defective* and he now plans to serve new notices of levy on Friday, October 11, 1974. However, the Commissioner will not demand an immediate turnover of the funds pursuant to these new levies.

It also appears from the post-remand proceedings before the district court on November 12, 1974,[15] that the IRS, in all likelihood, *never gave notice and demand of the assessment as required by the statute.* Thus, the affidavit relied upon by the IRS to show the statutory notice was mailed asserts that "copies of Department of Treasury Forms 17-A . . . were mailed to Samuel Shapiro on December 6, 1973." See Seufert Aff., Appendix B, pp. 10a-11a, *infra.* But, as respondent pointed out to the district court on November 12, 1974 (see Transcript, pp. 23-24), the very Form 17-A attached to the Seufert Affidavit – and asserted therein to have been sent to Mr. Shapiro in compliance with the statutory notice requirements – on its face appears to be the copy the taxpayer was supposed to receive. See Appendix B, p. 12a, *infra.* And Mr. Shapiro never

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[15] The Transcript of proceedings held on November 12, 1974, was lodged with the Clerk of this Court by the government. See Govt. Br. 10, n. 7.

received the notice of assessment the IRS claims was mailed. November 12, 1974 Transcript, pp. 19, 23.[16]

For these reasons, a full hearing before the district court would establish, we believe, that (1) the assessment was invalid for failure to issue a notice and demand; (2) the lien was invalid for failure to establish a refusal to pay after demand; and (3) the levy was invalid for failure to provide prior notice and demand. The district court erred, we submit, when it assumed that levies filed on October 11, 1974, made the challenge "moot." Since there was neither a valid prior assessment nor a valid prior lien, the new levies in October 1974 cured nothing.

The law is clear that if the IRS seizes assets without complying with the notice-and-demand requirement, the seizure exceeds the lawful authority granted to the IRS and equity jurisdiction exists to invalidate any assessments and levies. See *Steiner v. Nelson*, 259 F.2d 853, 858 (7th Cir. 1958); *Bauer v. Foley*, 404 F.2d 1215, 1220-1221 (2d Cir. 1968), *modified on rehearing*, 408 F.2d 1331, 1333 (2d Cir. 1969); *Mrizek v. Long*, *supra*, 187 F. Supp. 830, 837-38 (N.D. Ill., 1959); *cf. United States v. Bonaguro*, 294 F. Supp. 750, 754 (E.D.N.Y. 1968).

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16 The IRS sought to explain the fact that the attachment to the Seufert Affidavit on its face appears to be the copy of the assessment notice supposedly mailed to Mr. Shapiro on the theory that the attachment itself might not be the actual copy of the Form 17-A notice but rather a computer printout from a magnetic tape, there possibly being no actual physical copy of what was allegedly mailed to Mr. Shapiro. See November 12, 1974, Transcript pp. 24-26. That theory fell a little flat when counsel for Mr. Shapiro pointed out that the Xerox of the attachment itself had a "jagged, torn edge" indicating that (a) this was not a magnetic tape printout and (b) was probably the actual copy of the Form 17-A the IRS claims it mailed to Mr. Shapiro on December 6, 1973 (which Mr. Shapiro never got). See November 12, 1974, Transcript p. 27.

That construction of the applicable statutory provisions comports with the express language of the Tax Injunction Act. Moreover, it comports with the two policies said by this Court in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962) to underlie the Tax Injunction Act. Thus, requiring the IRS to obey the express Congressional mandates for notice and demand cannot be said to interfere significantly with a Congressional purpose to ensure prompt collection of the revenues. Nor can such a requirement "unduly interfere with a collateral objective of the Act – protection of the collector from litigation pending a suit for refund." 370 U.S. at 7-8. In virtually every case of a good-faith revenue collection effort the Commissioner will obey the minimal notice requirements of the Act. And where the issue is in dispute, judicial determination of the facts does not require a ruling on the merits of the underlying tax liability. Finally, the notice issue itself is relatively simple and – assuming minimally competent record-keeping by the IRS – susceptible of speedy judicial resolution. Compare *Bauer v. Foley*, 404 F.2d 1215 (2d Cir. 1968), *modified on rehearing*, 408 F.2d 1331 (2d Cir. 1969), with *Trent v. United States*, 442 F.2d 405, 406 (6th Cir. 1971).

A ruling depriving the district court of jurisdiction to invalidate assessments and levies made with no notice whatsoever to the taxpayer would utterly obliterate the express Congressional directive to the IRS requiring notice of the claim before firing the "atomic cannon" of Section 6861 at a taxpayer. Thus, absent equitable intervention, the taxpayer would be left totally without a remedy against IRS action in defiance of the explicit notice requirements of the Code. In according the IRS the extraordinary and potentially devastating powers of summary seizure of a taxpayers' assets without prior hearing in any forum, Congress has at least conditioned the exercise of *both* the power of assessment and the power of levy on notice and demand for payment. In *Clark v. Campbell*, 501 F.

2d 108, 122-23 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3350 (U.S. Dec. 9, 1974) (No. 74-722), the Court of Appeals detailed the "atomic potentialities" (501 F.2d at 110) of this "awesome" weapon in the IRS arsenal. It noted (501 F.2d at 123):

> We ought not to lightly disregard the apparent Congressional intention to temper the effects of this potentially devastating summary power.

Similarly here – where the Congressional intent to temper the IRS' use of this devastating weapon with minimal notice requirements is explicit – the Court should not construe another statute as prohibiting the federal judiciary from at least confining the IRS to the minimal procedures Congress did choose to provide to ensure taxpayers an opportunity to be heard by the IRS and to undertake voluntary compliance before seizure of their assets and destruction of their financial relations with creditors. Without such protection, serious constitutional issues are presented. See *Mrizek v. Long, supra*, 187 F. Supp. 830 (N.D. Ill. 1959);[17] *Rambo v. United States*, 492 F.2d 1060, 1064-65 (6th Cir. 1974), *petition for cert. filed*, 43

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[17] The court in *Mrizek v. Long* stated (187 F. Supp. at 835):

> The Court holds that if plaintiffs are being thus deprived of their property by administrative action purporting to conform, but failing to conform, to the requirements of Section 6331, the plaintiffs have sufficiently alleged deprivation of property without due process of law in violation of the Fifth Amendment.

U.S.L.W. 3017 (U.S. July 10, 1974) (No. 73-2005);[18] *Schreck v. United States*, 301 F. Supp. 1265, 1281 (D. Md. 1969), *reaffirmed on reconsideration*, 375 F. Supp. 742 (D. Md. 1973), *appeal docketed*, No. 74-1566, 4th Cir. May 16, 1974.

B. The IRS actions are unlawful because they were not part of a good-faith effort to collect revenue.

The verified complaint which instituted this proceeding alleged that the IRS agents involved in Mr. Shapiro's case knew long before their assessment of his impending extradition and of the fact that the funds seized on December 6, 1973, were "being utilized . . . as security for his appearances in the administrative and judicial proceedings in the United States" (App. 12). The complaint also alleged that the agents could have inquired of Mr. Shapiro, while these funds were on deposit as security, regarding his alleged tax liabilities (App. 14). The complaint concluded *(Id.)*:

> 29. It is plaintiff's belief that the delay in instituting any inquiry whatever with respect to plaintiff's taxes was a deliberate means of preventing him from asserting defenses to the tax claim and denying him assistance of counsel in any proceeding relating thereto.

This allegation was borne out through the district court's inquiries into IRS activity which are discussed below.

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[18] In *Rambo v. United States* (492 F.2d at 1065), the court stated:

> A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law.

1. *Timing of the assessment* – The circumstances of the seizure were such that doubts as to the IRS' good faith must necessarily arise. The jeopardy assessment itself was so timed that the plaintiff might have been extradited without even knowing before his surrender that the IRS had seized his funds. As matters turned out, he was given the courtesy of a telephone call from one – and only one – bank on the day the levies were made, and this is how he learned that his assets had been taken. The copies of the notices of levy, which on their face falsely assert that "demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay" (*e.g.*, App. 22) (compare 26 U.S.C. § 6331(a)), were not, as one might expect, sent to Mr. Shapiro by mail. The Internal Revenue Service held them and did not give them up until Mr. Shapiro's counsel met with them on the afternoon of Monday, December 10, 1973. See Letter of Nathan Lewin, to Victor F. Godfrey, p. 1, Exhibit IV to Verified Complaint, Appendix D, pp. 24a-29a, *infra*.

The absence of notice and demand to Mr. Shapiro – which we have previously discussed – adds to the doubts regarding the IRS' good faith. Indeed, the court below made that observation in footnote 12 of its opinion (499 F.2d at 532 n. 12):

> Certainly, such a failure [to provide notice] would vitiate much of the good faith presumption accorded the IRS in these matters.

It is ironic that the government now contends in this Court that the Commissioner believed jeopardy existed because of Mr. Shapiro's "scheduled departure from the United States" (Govt. Br. 18, n. 11). The IRS admitted, in response to interrogatories, that a criminal investigation was underway no later

than September 24, 1973 (App. 128-130).[19] Knowing that the funds were then tied up and could not be removed from the country, the IRS failed to inquire directly of Mr. Shapiro or request access to his books and records. Instead, the special agent interviewed – of all people – an Immigration and Naturalization Service officer and the Colonel attached to the Israeli Embassy who was to be the man accompanying Mr.

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[19] The IRS asserts, relying on its answers to plaintiffs' interrogatories, that the income tax investigation of Mr. Shapiro commenced on September 24, 1973. Govt. Br. 3. Plaintiff's first interrogatories asked "[o]n what date did the Internal Revenue Service begin an investigation or inquiry *of any kind* regarding the income tax liability of Samuel Shapiro for 1970 or 1971"? (App. 128). The response was:

> The investigation into the income tax liability of Samuel Shapiro for the years 1970, 1971 and 1972, was first assigned to a special agent for investigation on September 17, 1973. However, because of a prior commitment to be on jury duty, the agent did not actually commence any investigation until September 24, 1973.

The question asked, but not answered, is when *any* investigation was then started, not when the special agent was assigned. The, when asked if the Justice Department or the U.S. Attorney communicated with any agent of the IRS on this matter (Interrogatory Two, App. 128) the IRS refused to answer on the ground that the question is (App. 129):

> . . . too broad in that it seeks information with respect to every employee of the Department of Justice as well as every employee of the Internal Revenue Service; the information sought is irrelevant and immaterial to the matters presently before the Court; it is burdensome and harrassing and calls for interoffice communications which are privileged.

Shapiro to Israel when he would be extradited. These are peculiar earmarks of a tax investigation, and they hardly justify the claim – made at the very last minute – that there is danger that money will leave the United States with the extraditee.

The district court, during the hearing of December 13, 1973, inquired of the IRS why it waited so long to make the jeopardy assessment (App. 37-38, emphasis added):

> THE COURT: But how much is owed?
>
> MR. FUERTH: Oh, I'm sorry, Your Honor, $90, 000.00. The tax assessment was $90,000.00.
>
> THE COURT: How long has that assessment been outstanding?
>
> MR. FUERTH: That assessment was made on December the 6th.
>
> THE COURT: Of this year?
>
> MR. FUERTH: Of this year, yes.
>
> THE COURT: *Well, why did you wait so long to do it?*
>
> MR. FUERTH: *We were conducting an investigation and this was the time we felt was appropriate to make it. The law merely requires that we make an assessment within three years of the date that a return is filed unless we show fraud.*
>
> We are given three years, pursuant to the provisions of Section 6501, Title 26, to make an assessment. And, of course . . . .

Subsequently, IRS was asked in an interrogatory (App. 130):

> 6. State why no effort was made by the Internal Revenue Service to inquire from Mr. Shapiro directly regarding his financial records for the years 1970 and 1971 before the levying of the jeopardy assessment.

The government's answer was as follows:[20]

> 6. This interrogatory is objected to as calling for information which is irrelevant and immaterial to the matters presently before the Court.

When it is borne in mind that all the time the IRS was concealing its investigation, most of the very assets it summarily seized were perfectly secure because the U.S. Attorney's Office and the Immigration Service had them posted as security for their bonds, the inference on the record as a whole is that the delay in inquiring of the taxpayer and then seizing his property on the eve of extradition without notice of any kind was a deliberate delay to exploit the extradition so as to seize the property without the burden of any judicial hearing.

A final telling fact that demonstrates the government's true motive is its refusal to accede to an immediate trial on the factual issues in the Tax Court – while Mr. Shapiro was still here and able to defend himself. As we have noted, a Tax Court petition was filed within ten working days of receipt of the Notices of Deficiency. The IRS took the full 60 days authorized by the Tax Court Rules to file a responsive *one-page* pleading. Thereafter, on April 11, 1974, Mr. Shapiro's counsel filed in the Tax Court a Motion for Expedited Trial, in which it was

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[20] Note that the government did not plead privilege to the inquiry. Only the timing of the government's extraordinary answer to this interrogatory allowed the government to escape compulsion to answer. The claim of irrelevance is, we submit, patently frivolous under Fed. R. Civ. Pro. 26.

asserted that the charges of illegality were "totally without substance" and that he wished a trial to take place "while he is in the United States to assist his attorney, to confront any witnesses against him, and to be able to challenge the alleged tax liability."

At a hearing in the Tax Court on April 24, 1974, on this motion, counsel for the IRS objected to a trial in the Spring of 1974, asserting that he was not prepared to proceed before the Fall. The court thereupon set the trial for September 1974 – by which time Mr. Shapiro had been forced to depart. At present, the Tax Court proceedings are in the midst of the discovery stage, and all further action has been stayed on Mr. Shapiro's motion pending resolution of this proceeding in this Court.

The pattern of consistent delay – which results in freezing Mr. Shapiro's funds over an extended period and thereby reducing the effectiveness of counsel and the taxpayer's willingness to defend himself – was reflected in the use of maximum time in bringing the case here. More than two months after the Court of Appeals' decision, the government's petition for rehearing was denied. No petition for certiorari was filed until 150 days thereafter – the longest time authorized by statute.

Judge Richey, on the bare record before him, was able to perceive a government purpose in delaying disclosure. He said, "[T]he Government was aware from the time this suit was filed and prior thereto, that there was a claim for these back taxes based on illegal trafficking in narcotic drugs, in this case hashish. For the like of me, I cannot understand why that was not made known, although perhaps the government was under no obligation to do so" (App. 154). After noting again that "the government would preferably have made known the basis for its claim," the judge concluded, "I really do not like the activity of the government in this case – I will tell

you frankly I don't, because I think this could have been at least disclosed at the time or some opposition be made before the man's departure . . ." (App. 154-155).

2. *Affirmative concealment.* From the inception of the jeopardy assessments on December 6, 1973, the IRS actively undertook to conceal the true basis for the assessment.

First, on December 10, 1973, Mr. Shapiro's counsel met with the responsible IRS agents to ascertain the basis of the IRS claim and discuss a possible resolution of the matter. Despite repeated requests, counsel was unable to ascertain from these agents the basis for the IRS claim. See para. 23 of the verified complaint, App. 13.[21]

Second, at the initial hearing on December 13, 1973, Judge Richey specifically inquired as to the basis for the levies in this case (App. 38):

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[21] In fact, the IRS agents at this meeting on December 10, 1973, actually implied by their questioning of counsel that the tax claim was based on a net worth-type theory – *i.e.*, where did Mr. Shapiro get his living expenses and lawyer's fees for the extradition case. See Transcript of December 13, 1973, proceedings, App. 55-56.

The agents at the meeting, incidentally, included the Special Agent in charge of the investigation (verified complaint, para. 23, App. 13; IRS Response to Interrogatory 5, App. 129-30) and one of the agents who recommended the jeopardy assessment (verified complaint, para. 23, App. 13; IRS Response to Interrogatory 8, App. 130).

THE COURT: Can you tell me the basis for a levy?

MR. FUERTH: For a levy or for an assessment, sir?

THE COURT: Well, for a levy and assessment here.

MR. FUERTH: The basis for an assessment is that there was unreported income in the years 1970 and 1971, income that was not reported on his return.

THE COURT: Do you have any evidence that you can present to the Court to verify that?

MR. FUERTH: No, Your Honor, not today.

Your Honor, if I may suggest – and I am prepared to make an argument on that – I would suggest, Your Honor, that this Court lacks the necessary jurisdiction to question the merits of either the assessment or the making of the jeopardy assessment.

At the same hearing, the IRS twice implied it intended to take the full sixty days allowed it under 26 U.S.C. § 6861(b) before issuing the required Notice of Deficiency. App. 39, 45.

Third, responses to Mr. Shapiro's interrogatories served on December 17, 1973, were evasive. One asked, "the precise liability that the Internal Revenue Service will assert in the notice of deficiency it will file with regard to Samuel Shapiro" (Interrogatory Nine, App. 131). When the government declined to respond prior to the hearing scheduled for December 19, 1973, Mr. Shapiro moved to shorten the allowed time (App. 79-81). Although the court ordered that the "government shall be required to answer such interrogatories before tomorrow, orally or in writing, as reasonable and diligent effort may provide" (App. 86), the government's answer on this interrogatory was (App. 131):

> This interrogatory is objected to on the grounds that the statutory notice of deficiency is pursuant to the provision of Section 6861(b), not required to be sent to the plaintiff, Samuel Shapiro, until February 4, 1974, and does not presently exist, and further objects on the grounds that this Court lacks the necessary jurisdiction to go into the merits of the tax liability of the plaintiff, Samuel Shapiro, and as such the information sought herein is irrelevant and immaterial to the matters presently before the Court.

Fourth, the IRS continued to imply that it would not be prepared to make disclosures until sixty days after the assessment (App. 125-126). Only when Judge Richey made it clear that he intended to rule imminently, did the IRS produce a Notice of Deficiency. The decision was to issue on December 21 at 3:00 p.m. At 12:20 p.m. on the same day, Mr. Shapiro's counsel was served with a supplement to the earlier answers to interrogatories to which were attached copies of the Notice of Deficiency for the tax years 1970 and 1971 (App. 132-136).[22] These papers were the first to suggest that "unexplained bank deposits" and "unreported taxable income . . . from

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[22] The supplemental response revealed that the Notice of Deficiency – which did "not presently exist" as of December 19, 1973, and which the IRS through counsel had repeatedly indicated *would not* go out until February 4, 1974 (the full 60 days) – had suddenly materialized and been mailed to Mr. Shapiro on December 21, 1973, after Judge Richey postponed his initial decision to that date. App. 132.

The time of service of this document on Mr. Shapiro's counsel is shown on the copy included at p. 296 of the Appendix filed in the Court of Appeals. See also December 21, 1973 Transcript, App. 140.

We point out on the statutory notice issue that the cover letter to the Notice of Deficiency asserts that "[a]ssessment of the deficiencies and additions to the tax mentioned has been made under the provisions of the internal revenue laws applicable to jeopardy assessments" (App. 133) without making any reference whatsoever to prior notice to Mr. Shapiro.

your activities as a dealer in narcotics . . ." were at issue. The only further explanation for the income figure was the assertion that Mr. Shapiro realized $381,680.00 in gross income from hashish sales during the year 1971 (App. 135-136). Thus, roughly 93% of the government's claim of right to Mr. Shapiro's property rested on a specific allegation of criminal conduct – plainly known long before – and a totally unsubstantiated claim of gross income derived from such conduct, which allegation was consciously withheld from *both* the district court *and* Mr. Shapiro's counsel in the face of repated inquiries by the court and Mr. Shapiro and a discovery order by the court. It was suddenly sprung on both the court and Mr. Shapiro literally hours before the Court's scheduled decision.

What purpose could all this concealment have had other than to prevent Mr. Shapiro from rebutting the charges and seeking to vindicate himself? Obviously, the government was hoping that Mr. Shapiro would be out of the country before it would have to make its allegation against him.

3. *General IRS practice.* In evaluating the record before this Court to determine whether a claim of bad-faith utilization of Section 6861 powers to defeat Mr. Shapiro's statutory and constitutional rights to a pre-seizure hearing on the tax claim has been adequately raised (see pp. 35-40, *supra*), consideration must also be given to matters already in the public domain regarding IRS use of jeopardy assessment powers in narcotics cases at the time this case was unfolding in the District Court.

We note initially that publicly reported cases indicate that the IRS has – where narcotics are concerned – followed a policy of utilizing its jeopardy assessment powers "not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures." *Willits v. Richardson*, 497 F.2d 240, 246 (5th Cir. 1974); *Aguilar v. United*

States, 501 F.2d 127, 130-131 (5th Cir. 1974). See also, *Rinieri v. Scanlon*, 254 F. Supp. 469, 472-73 (S.D.N.Y. 1966); *Lisner v. McCanless*, 356 F. Supp. 398, 401 n. 5 (D. Ariz. 1973); *Woods v. McKeever*, 32 Am. Fed. Tax R.2d 5967 (D. Ariz. 1973), *appeal docketed*, No. 74-1133, 9th Cir. Jan. 25, 1974.[23]

In fact, the IRS has formally instituted a narcotics project, the stated purpose of which is to "disrupt the distribution of narcotics through the enforcement of all available tax statutes . . . maximum use [is to be] . . . made of jeopardy, quick, and transferee assessments, and termination of taxable periods." Silver, *Terminating the Taxpayer's Year: How the IRS Uses It Against Narcotics Suspects*, 40 J. Taxation 110 (1974) *quoting from IRS Manual* (Supplement November 10, 1971). In a speech before the American Bar Association Tax Section at the annual A.B.A. Convention in Hawaii on August 14, 1974, IRS Commissioner Alexander stated that the IRS recently changed its policy (Appendix E, p. 43a, *infra*):[24]

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[23] In this regard, the IRS stated in response to the first Interrogatory that "[t]he investigation into the income tax liability of Samuel Shapiro for the years 1970, 1971 and 1972 *was first assigned* to a special agent for investigation on September 17, 1973" (App. 128) (emphasis added). If this answer means that the IRS investigation began with a "special agent" (see Govt. Br. 3; but see note 19, *supra*), then that investigation *was probably criminal and narcotics-related from its inception.* See *Donaldson v. United States*, 400 U.S. 517, 534-35 (1971).

[24] But – as reported in *The Wall Street Journal* of May 19, 1975, p. 24, – the Justice Department appealed to the Secretary of the Treasury Department to reverse Commissioner Alexander's professed new policy. See Appendix F, pp. 59a-63a, *infra*.

As regards our intelligence operations, the overall emphasis of our criminal enforcement activities has been shifted away from special enforcement programs such as Narcotics Traffickers and Strike Forces, and have been aimed more directly toward the taxpaying public in general. This shift in emphasis has enabled us to achieve greater occupational and geographic coverage in our criminal tax sanctions are more equitably applied – reaching the broadest possible spectrum of society within our resource limitations I believe that our revised enforcement philosophy and not only achieves this goal, but more fully meets the intent of Congress in that our resources are being used for the enforcement of tax statutes, rather than as alternative methods for the prosecution of violators of laws normally enforced by other Federal or local agencies.

The bar of the Tax Injunction Act does not prohibit a federal court from at least requiring that the IRS exercise its extraordinary revenue collection powers in good faith. Thus, in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7-8 (1962) this Court observed:

> To require more than good faith on the part of the government would unduly interfere with a collateral objective of the Act – protection of the collector from litigation pending a suit for refund.

And last term in *Bob Jones University v. Simon*, 416 U.S. 725, 740 (1974), this Court carefully reiterated the "good faith" qualification on the IRS immunity from injunction implicit on the above-quoted passage from the *Williams Packing* case (emphasis added, footnote omitted):

> The Service bases its present position with regard to the tax status of segregative private schools on its interpretation of the Code. *There is no evidence that that position does not represent a good-faith effort to enforce the technical requirements of the tax laws, and without* indicating a view as to whether the Service's interpretation is correct, we cannot say that its position has no legal basis or is unrelated to protection of the revenues. *The [Tax Injunction] Act is therefore applicable.*

In *Sherman v. Nash*, 488 F.2d 1081 (3d Cir. 1973) the taxpayer sought injunctive relief against a jeopardy assessment, alleging, *inter alia*, that the assessment was "imposed solely to harass and coerce plaintiffs for improper purposes." 488 F. 2d at 1083. The alleged "improper purposes" were that "the IRS was assisting the Justice Department in an attempt to force Mr. Sherman to appear before a grand jury investigating various criminal activites in Hudson County, New Jersey." The Third Circuit, after carefully evaluating the legislative policies behind the Tax Injunction Act, the Section 6861 jeopardy assessment power, and the Revenue Act of 1924 (see 488 F.2d at 1083-1084) held these allegations sufficient to sustain district court jurisdiction to determine if the IRS acted in good faith under Section 6861 (488 F.2d at 1084) (footnote omitted):

> Our decision today in no way deviates from this Congressional policy, for we fully concur with those courts which have concluded that Congress withheld jurisdiction from the district courts to review the sufficiency of the facts relied upon by the IRS to support a belief that jeopardy exists. *E.g.*, Transport Manufacturing & Equipment Co. v. Trainor, 382 F.2d 793 (8th Cir. 1967); United States v. Bonaguro, 294 F. Supp. 750, 753 (E.D.N.Y. 1968).

This does not mean, however, that Congress intended that by merely following the formal procedures of Section 6861, the IRS should have thereby complete license to act arbitrarily and in bad faith and for other than the purpose of preserving revenue. *See* Iannelli v. Commissioner of Internal Revenue, 487 F.2d 317 (3d Cir., filed June 29, 1973); *Bonaguro, supra.*

When the IRS has acted ostensibly under Section 6861, but in fact has used the jeopardy assessment as a device to harass a taxpayer or as a leverage to exert pressure on a taxpayer for nontax purposes, it has exceeded its statutory authority. Section 7421 does not shield such unauthorized acts from judicial review; since they are not authorized by Section 6861, they are prohibited by the general provisions of Section 6213 and are subject to the injunction authorized therein. For these reasons we conclude that the allegations in the Shermans' complaint to the effect that the only reason the IRS imposed the jeopardy assessment was to harass and coerce the plaintiffs for improper purposes are sufficient to give the district court jurisdiction under 26 U.S.C. § 6213.

The Third Circuit's conclusion is supported by the language and legislative history of the jeopardy assessment provision. The power to make such summary determinations, now embodied in Section 6861 of the Code, has its genesis in the Revenue Act of 1924, Section 274(d), 43 Stat. 297. See Govt. Br. 18 n. 11. The main purpose of the 1924 Act was to alleviate the great hardships for taxpayers created by the pre-existing summary collection powers of the IRS. The 1924 law gave a taxpayer an option to obtain review by Board of Tax Appeals

of a claim made against him *before* the IRS could lawfully assess the tax and levy on the taxpayer's property. The House Report states (H.R. Rep. No. 179, 68th Cong., 1st Sess. 7, quoted in *Flora v. United States, on rehearing,* 362 U.S. 145, 158-59 (1969)):

> The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination on the questions involved, he can not, in view of Section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

The effect of the 1924 Act was to prohibit assessments and levies until issuance of a Notice of Deficiency, as authorized in § 6212. Congress explicitly authorized injunctive relief to enforce this prohibition (26 U.S.C. § 6213(a)):

> Notwithstanding the provisions of Section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

And the only exception to this general rule was "[e]xcept as otherwise provided in Section 6861. . . ."

Section 6213(a) is "a keystone in a carefully articulated and quite complicated structure of tax laws." *Cf. Flora v. United States, supra,* 362 U.S. 145, 157 (1960). A salient feature of the statutory scheme is that Congress created a jeopardy assessment and summary collection power only to cover the rare instances when, in the exercise of proper revenue collection, there is real jeopardy that the funds will not be available. The primary purpose of the 1924 amendment was to accord the American taxpayer a basic and fundamental procedural right – the right to an impartial hearing on an IRS claim before assessment and collection. Where bad faith – in the sense of a purpose other than revenue collection – is alleged, and there is a *prima facie* basis for believing the allegation to be valid, it would defeat the overriding objective of the 1924 Act to bar judicial scrutiny.

Any other construction of Sections 6213(a), 6861(a) and 7421 would lead to the anomalous result that if the Commissioner wishes to avoid judicial review prior to assessment and collection, he need just invoke Section 6861. The exception would then swallow up the rule.

If, on the other hand, injunctive relief is permitted where the jeopardy assessment appears to be in "bad faith" as defined above, such a remedy would not interfere unduly with the policies described by this Court in *Williams Packing* as underlying the Tax Injunction Act. Enjoining jeopardy assessments

designed for law-enforcement purposes unrelated to revenue collection does not interfere with "the manifest purpose" of the Anti-Injunction Act – *i.e.*, "prompt collection of . . . lawful revenue". 370 U.S. at 7.

The "bad faith" line has effectively been used by this Court to mark off another area where excessive judicial interference is believed harmful. In *Dombrowski v. Pfister,* 380 U.S. 479, 490 (1965), it held that where it is alleged in a federal court that State criminal proceedings have been instituted in bad faith, without any hope of ultimate success, a district court may enjoin the State process. And in *Younger v. Harris,* 401 U.S. 37, 48-50 (1971), in which the *Dombrowski* principle was significantly narrowed and clarified, this Court's majority explained that federal courts had the authority to prevent a State prosecution "brought in bad faith."

The policy benefits of limiting judicial power are at least as important in the area of "Our Federalism" as they are in tax collection. Yet this Court has recognized in the federalism cases that no great breach of this overriding policy is caused by an exception for those instances when individuals are subjected to bad-faith excesses by persons wielding power through government posts. The same exception is justified for the Anti-Injunction Act.

We note, finally, that this is not a case of "conclusory allegations" of bad faith. See *Sherman v. Nash, supra,* 488 F.2d at 1086 (Van Dusen, J., dissenting). What the record establishes here is:

> 1) an assessment and levy which are incontestably illegal for want of statutory notice and instituted without any prior notice whatever one business day before – as the IRS knew – the taxpayer was going to be removed from the jurisdiction;

2) an assessment based on a narcotics charge, in the context of a public record which reveals an agency policy of using assessment powers as an adjunct to narcotics law enforcement even where no legitimate revenue collection purpose is evident;

3) an active effort to conceal from the taxpayer and a United States District Court the true basis of the assessment prior to the removal of the taxpayer from the jurisdiction in the face of repeated inquiries by both the Court and the taxpayer and an outstanding discovery order;

4) a constant effort to delay the public airing of the criminal charges so as to undermine the taxpayer's opportunity to meet the allegations and disprove them.

The Court of Appeals has given the taxpayer the opportunity to prove the allegations of bad faith in a district court proceeding, and the Anti-Injunction Act does not, we submit, preclude such an inquiry.

II. THE ANTI-INJUNCTION ACT IS NOT VIOLATED BY REQUIRING THE IRS TO PRODUCE SOME EVIDENCE TO SUPPORT AN ALLEGATION OF CONTINUOUS CRIMINAL ACTIVITY WHICH IS DENIED UNDER OATH BY THE TAXPAYER, WHO PRODUCES CORROBORATING EVIDENCE.

We have discussed, in the first portion of our Brief, the unusual circumstances of this case that warrant a full hearing in the district court on the validity of the IRS' actions. We turn now to a consideration of the issues which the government would like to isolate from the full factual picture, but which we believe cannot be treated as if they were presented in a vacuum.

The government's position is, essentially, that collection pursuant to a jeopardy assessment, even where based on allegations of criminality, may be treated like any other phase of the assessment-and-collection duties of the Commissioner. To the government, this case is like *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), and like *Bob Jones University v. Simon*, 416 U.S. 725 (1974), even though neither of those cases involved (1) seizure under a jeopardy assessment of all of a taxpayer's assets, (2) tax liability based on a charge of continuous criminal conduct, (3) denials under oath of the *entire factual predicate* for the tax liability, and (4) indicia of bad faith on the part of the IRS. We believe that all these are important considerations which substantially distinguish this case from *Williams Packing* and *Bob Jones*. And we believe that the consequences of the seizure for this taxpayer – albeit not as disastrous as was feared when suit was instituted – are as much "irreparable injury" as those in *Williams Packing* and *Bob Jones*, where the Court found that there was harm to the taxpayers – justifying equitable intervention absent the Anti-Injunction Act.

It is, of course, one thing to say – as *Williams Packing* and *Bob Jones* do – that the usual civil tax issue must be litigated through a refund suit or in a Tax Court proceeding except where a taxpayer is able to prove, beyond debate and without compelled disclosure of the IRS case, that "under no circumstances could the Government ultimately prevail." The procedures prescribed by the Code – recognized by this Court as not necessarily "the best that can be devised" (416 U.S. at 747) – are suitable and adequate when a taxpayer is present, has funds to pay an attorney to represent him in a civil tax proceeding, and is confronted with the usual civil claim in which he has the understandable burden, under the Code, of proving his case by a preponderance of the evidence.

The circumstances are entirely different, however, when the tax claim is made just as the taxpayer has one foot on a plane that will take him out of the United States forever, when it is accompanied with a seizure that confiscates all his assets and makes it impossible for him to retain an attorney,[25] and when it is based on an allegation the government ordinarily has the burden of proving and that a taxpayer can only refute by denying it outright – as Mr. Shapiro did. In such a factual context, we are much closer to the situation described in this Court's *Bob*

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25 Counsel representing Mr. Shapiro in this Court also represented him in the extradition proceeding and were compensated for services relating to that proceeding. Counsel advises this Court, however, that no compensation whatever has been received for services since December 6, 1973 – *i.e.*, for any legal services in this case or in the Tax Court. We have represented Mr. Shapiro out of a sense of duty to a man who has been our client and has been badly treated by government agents. Future taxpayers may not be able to find counsel so sympathetic to their plight.

Jones opinion – where "an aggrieved party has no access at all to judicial review." 416 U.S. at 746. Indeed, Mr. Shapiro sought the quickest route to judicial review. Eschewing a refund suit in the district court since it would have required exhaustion of administrative refund remedies (which would doubtless have been delayed for a full six months), he filed a Tax Court action and asked for an immediate trial. The government succeeded in deferring the trial – on grounds that counsel was unprepared – until the accused was safely beyond a place where he could confront his accusers (if any, in fact, exist), assist his counsel at trial, and take the stand in his own defense.

A careful analysis of the government's position can most fruitfully begin, we believe, with a comparison of a situation in which tax liability is based on a civil claim with one in which criminality is alleged. If *Williams Packing* and *Bob Jones* apply, as the government urges, to tax claims based on charges of criminal conduct, there is no limit to the availability of the IRS remedy against anyone suspected of crime. If a suspected bank robber or embezzler or garden-variety thief or mugger finds himself the target of a levy pursuant to a jeopardy assessment, how can he ever prove that "under no circumstances could the Government ultimately prevail" on its criminal charges? So long as the government keeps its evidence secret, he has no way whatever of meeting the charges made other than flatly to deny the allegation.

Our Constitution, as judicially construed, has erected substantial safeguards to insure that no one be convicted on criminal charges without careful procedures and objectively demonstrable proof. To sustain a conviction, evidence must be sufficient to establish a case beyond a reasonable doubt, and even to seize evidence or formally to

institute a criminal proceeding, probable cause is required. And each of these standards must be applied by a disinterested party, not by the enforcing agency. As this Court forefully observed in *United States v. United States District Court*, 407 U.S. 297, 317 (1972) (citation omitted):

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

The effect of the government's argument – if applied here – is to rule that whenever federal tax consequences may flow from criminal activity (which probably covers at least 90 percent of crime in the United States), IRS agents become "sole judges" of their right to seize the alleged proceeds of the crime.

If a prosecutor were to seek the same objective, he would be forced to produce enough evidence to satisfy a neutral and detached magistrate that there was probable cause to believe that the target of his seizure had committed the offense and that he had possession of the proceeds. But if the IRS seeks the same end, the government claims that the Anti-Injunction Act forbids the taxpayer

from requiring such a demonstration – even after the taxpayer comes forward (as he is *not* obliged to do in the usual criminal case), denies the allegation under oath and submits corroborative proof.

The public record indicates that, in dealing with suspected criminals, the IRS, operating to accommodate law enforcement authorities with goals unrelated to legitimate revenue collection, has structured its claims to justify assessments that would tie up all known assets of a narcotics or gambling target without regard to whether or not there is any foundation whatsoever for a tax claim comparable to the size of the assessment. A classic example is *Rinieri v. Scanlon*, 254 F. Supp. 469, 474 (S.D.N.Y. 1966), wherein the *modus operandi* of the IRS agent was revealed in the following colloquy:

> Q. To be very blunt about it, isn't it the fact that you were just merely told to write a report that would come out with an income tax of approximately $24,500 so that the government would have a basis of seizing this money, isn't that the blunt fact?
>
> A. That would be part of it. My position is to protect the government.
>
> Q. I want an answer, yes, or no, Mr. Vita. Isn't that the blunt fact?
>
> A. Yes.

The *Rinieri* Court characterized the IRS' conduct as "arbitrary, capricious and unconscionable." 254 F. Supp. at 474. The "blunt" fact is that – where individuals are thought to be engaged in narcotics or gambling or other illegal activity – this type of thing is not uncommon.

See *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974); *Aguilar v. United States*, 501 F.2d 127 (5th Cir. 1974); *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969); *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973); *United States v. Bonaguro*, 294 F. Supp. 750 (E.D.N.Y. 1968). In fact, in the narcotics area, use of the jeopardy assessments powers to disrupt the alleged criminal endeavor *was an acknowledged IRS policy*. See Silver, *Terminating the Taxpayer's Taxable Year: How the IRS Uses It Against Narcotics Suspects*, *40 J. Taxation* 110 (1974); pp. 44-50, *supra*.

The Fifth Amendment protects a criminal accused – even in the police station (*Miranda v. Arizona*, 384 U.S. 436 (1966)) from being forced to rebut allegations that he engaged in illegal activity. Yet, a strict application of *Williams Packing* and *Bob Jones* to a situation such as this one would require a full disclosure as the only means to prevent extreme forfeitures. While we do not argue that a taxpayer such as Mr. Shapiro has no burden whatever, we believe his obligation must also be measured by Fifth Amendment standards. The government offers the following characterization of the evidence submitted by Mr. Shapiro (Govt. Br. 15, 32):

> The only evidence submitted by respondent during the first proceeding was a single affidavit which simply alleged that he was not liable for the additional amount assessed. This blanket denial of liability is insufficient to meet the *Williams Packing* test. Moreover, even after the Commissioner issued the notice of deficiency to respondent determining that he had unreported income from activities as a dealer in narcotics, respondent still

> failed to produce any evidence to establish that the assessment was without foundation. . . .
>
> * * *
>
> Moreover, even after the Commissioner issued a notice of deficiency to respondent determining that he had unreported income from activities as a dealer in narcotics, . . . respondent did not even come forward personally to deny the Commissioner's determination. Rather, one of his counsel merely told the district court that respondent had advised another of his counsel that the Commissioner's determination of income from narcotics dealing was false (A. 138). This twice-removed assertion does not even rise to the level of credible evidence, much less establish that the assessment was without foundation.

This characterization is totally erroneous. The affidavit filed on December 13, 1973, states, *inter alia* (App. 20):

> 2. I have been advised by my counsel that the Internal Revenue Service claims that I owe more than $92,000 in taxes for the tax years 1970 and 1971. I filed a tax return for the 1971 tax year, which was accurate and which properly reflected my income and tax obligations. I had no income whatever for 1970.
>
> * * *

> 4. I have also been advised by my counsel that the Internal Revenue Service questioned him on where I had the money to live and to pay for the services of counsel in the matter of my extradition. Before arriving in the United States, I had made successful investments in Europe and had funds at that time, part of which I brought with me and the other portions of which were brought to me after I arrived in the United States. I can establish this fact by documentation and by testimony of witnesses, and would be prepared to do so in a *bona fide* inquiry into my tax obligations.

That affidavit replied factually, intelligently and completely as the taxpayer could in the face of the IRS' conduct at that point in: (a) refusing despite repeated inquiries on December 10, 1973, to tell Mr. Shapiro the basis for the IRS claim of taxes due (App. 13); and (b) actually misleading counsel at that time into believing that the IRS was essentially going on some sort of net-worth theory based on Mr. Shapiro's living and litigating expenses during the taxable years (App. 55-56).

At this point Mr. Shapiro had not even been told the amount of income the IRS thought he had earned, much less the alleged nature of the income. Nonetheless, in addition to a "blanket denial," he under oath (a) set forth in general the source of the funds, his use of which the IRS had led his counsel to believe was the main source of their claim, and (b) made a proffer of documentation and testimony of to prove his sources. In the face of a failure on the IRS' part to offer an iota of specification of what it was claiming, that affidavit went as far as the taxpayer could intelligently go.

Moreover, when the true basis for the claim finally was revealed by the IRS on December 21, 1973, Mr. Shapiro, in his verified petition in the Tax Court (filed January 3, 1974), denied the narcotics charge under oath (App. 162).[26] At the hearing itself – held (by schedule announced to all parties the prior day) less than three hours after the government sprang the document it had maintained on December 19, 1973, was not in existence revealing the narcotics charge – Mr. Shapiro (who was then in New York City) made his denial the only way he could: *i.e.*, through his counsel's representations (App. 138). It ill behooves the IRS in this Court now to question the evidentiary sufficiency of that denial on the record as it stood before the district court on December 21, 1973, when it dismissed the complaint.

Requiring the IRS to come forward in the face of these denials with some credible evidence cannot interfere with legitimate revenue collection goals or unduly subject the collection to collateral litigation. Thus, the IRS is not being required to "prove" its claim. All it need do is show some credible evidence that (a) its target was in fact engaged in the activity in question and (b) its projections are based on some reality.

For these reasons, the circuit courts have consistently recognized that the IRS may be expected to make a showing of some credible foundation for its charge and its

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[26] The Tax Court Petition was produced as part of the record before the court of appeals (CA App. 308-16), and relied on by Mr. Shapiro in that Court. See Br. for Appellants in No. 73-2260, p. 22 n. 13.

projections.[27] Indeed, insofar as *Lucia* and *Pizzarello* involve wagering taxes – where there is no general right under Section 6213(a) to judicial review prior to payment

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[27] In *Hamilton v. United States*, 309 F. Supp. 468 (S.D.N.Y. 1969) – cited by the Government in its Brief at 30 n. 20 – the Court sustained the income extrapolation because – unlike *Pizzarello* (and the instant case) the record "reveals an independent evidentiary basis for the Government's determination that plaintiff was in the wagering business from July 1961 to May 1965." 309 F. Supp. at 473. Moreover, the Court noted that "[r]esort to [the IRS extrapolation] here became necessary only because plaintiff failed to maintain and furnish the daily records required to be kept by 26 U.S.C. §4403 (see n. 4)." 309 F. Supp. at 473. Finally, the record showed four taxpayer convictions over an eight-year period on gambling charges. 309 F. Supp. at 470 n. 5a.

In affirming the *Hamilton* case, the Second Circuit made certain that the Government would not be able to infer an intention to back away from *Pizzarello*. See *Hamilton v. United States*, 429 F.2d 427 (2d Cir. 1970), *cert. denied*, 401 U.S. 913 (1971):

> We affirm for the reasons stated in Judge Mansfield's opinion, 309 F. Supp. 468 (S.D.N.Y. 1969) which, among other things, pointed out that the facts differ in important respects from those which we consider dispositive in Pizzarello v. United States, 408 F.2d 579 (1969), cert. den. 396 U.S. 986. . . .

In *James v. United States*, 510 F.2d 860, 861 (6th Cir. 1975) – cited at Govt. Br. 29 n. 19 – the Sixth Circuit *did not adopt* the apparent District Court assertion that *Lucia* and *Pizzarello* "carved out further exceptions" to the Tax Injunction Statute. Rather, it put its affirmance on *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), and *Trent v. United States*, 442 F.2d 405 (6th Cir. 1971). In *Cole v. Cardoza*, 441 F.2d 1337, 1342, the Court – in rejecting the strictly conclusory allegations of the complaint, noted:

> The difference in amount between that charged in the indictment and that assessed for civil liability is not enough to indicate that the Government cannot

(cont'd)

of the tax, see *Trent v. United States*, 442 F.2d 405, 406 (6th Cir. 1971) – there is even more justification here than there was there for requiring the IRS to come forward with its basis.

The government erroneously contends in its brief in this Court that the effect of the court of appeals' decision is "invert[ing] the burden of proof applicable in tax cases" (Govt. Br. 27) by requiring the Commissioner to "prove . . . the facts upon which a tax assessment is based" (Govt. Br. 2). The government is doubly wrong. To be sure, there is a presumption of validity to the usual Notice of Deficiency issued by the IRS, and a taxpayer ordinarily has the burden of proving that an assessment is erroneous. But that presumption does not apply, by Congressional directive in Section 7454(a) of the Internal Revenue Code, in "any proceeding involving the issue whether the [taxpayer] has been guilty of fraud with intent to evade tax."

Tax liability based on illicit conduct necessarily carries with it an allegation of fraud with intent to evade tax – whether or not fraud is expressly alleged. Consequently, the proper party on whom the burden of proof should rest where illegality is charged is the Commissioner. By

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(Footnote 27 cont'd)

> under any circumstances prevail. In this regard, we note that appellants failed to deny that Mr. Cole was in fact engaged in wagering or that he was liable for the $14,744.58 assessed or any part thereof. . . .

In *Trent v. United States*, the opinion does not reveal if the mode of projection was challenged but indicates only that the taxpayers "assert that they were not in the wagering business at all. . . ." 442 F.2d at 406.

entering a jeopardy assessment and then calling on the taxpayer to establish his innocence of the allegation, the Commissioner is the one who is "inverting" the burden of proof.

Moreover, on the government's premise that the taxpayer retains the burden of proving nonliability even where criminality is alleged, the decision below did *not* require the Commissioner to "prove" anything in the usual sense of the word. A careful reading of paragraphs numbered 4 and 5 in Section III of the court's opinion (Pet. App. 13A-16A) and of the remand instructions appearing in Section IV (Pet. App. 16A-17A) will demonstrate that a minimal burden is imposed on the government.

Initially, it should be noted that the court emphasized and quoted from both *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973) (*en banc*), and *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969), in both of which *it was undisputed that the taxpayer had engaged in at least one illegal transaction.* The only question in both *Lucia* and *Pizzarello* was whether the illicit activity – acceptance of wagers – had continued over the period of time that the IRS claimed.[28] In the present case, the taxpayer disputes, under oath, ever

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[28] This Court can, we believe, take judicial notice that it is far more probable that one who has operated a bookmaker over a period of three days (as did Pizzarello) has engaged in the same activity over the full tax year than that one who has transferred narcotics (as Mr. Shapiro is alleged to have done) or one, two, three or half a dozen occasions had done so over a full tax year. Operating a bookmaking establishment is more likely to be a regular occupation than the sporadic transfer of narcotics.

having sold narcotics. Hence, the Commissioner's obligation to provide some rational factual support for its summary seizure should be heavier in this case than in *Lucia* or *Pizzarello* since neither illegality nor the mathematical projection by which the total liability is derived is conceded.

The text and footnote 27 of the court's opinion plainly indicate that the court below read both *Pizzarello* and *Lucia* as requiring that the government "prove" only that its deficiency was not "arbitrary and plainly excessive." In explaining its ruling in light of the Second and Fifth Circuit cases, the court concluded (Pet. App. 16A):

> [A]t the very least the District Court must obtain some evidence by which to judge whether the asserted deficiency was a tax or was so arbitrary and excessive as to be "an exaction in the guise of a tax." . . . The District Court should therefore inquire whether there are any facts from which good faith may be inferred, and absent such facts, the judge should not dismiss the case in deference to any presumption in favor of the IRS.

Although we believe that, at the very least, a "probable cause" standard should apply in these circumstances, the court below did not even set so minimal a threshold. By describing the test as whether the asserted deficiency was "arbitrary and excessive" and whether "there are any facts from which good faith may be inferred," the court of appeals apparently permitted the government to sustain its

seizure with less than what is required for a seizure of evidence or for a formal charge.[29]

Apparently, in order to demonstrate that too severe a burden is being imposed on the Commissioner, the government has submitted for this Court's examination the record on remand after the decision which was the subject of the petition for certiorari. Assuming *arguendo* that the record may be considered here, we believe that it refutes the argument made at pages 33-35 of the government's brief.

There are, as we have previously noted, two discrete premises underlying government's claim:

First, that Mr. Shapiro sold hashish.

Second, that he did so on a regular basis throughout the tax year, thereby incurring the claimed tax liability. The affidavit upon which the Commissioner relied for his "factual submission" did not meet the most minimal standard of proof on the second of these propositions and failed to meet the established "probable cause" standard on the first.

With regard to Mr. Shapiro's alleged dealings in hashish, the total basis for the revenue agent's conclusion was:

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[29] Judge Richey said on remand (Transcript of November 12, 1974, p. 11):

> The burden is on the government to show that the claim is not entirely excessive, arbitrary, capricious, and without factual foundation.

> (a) "*information supplied* to the Internal Revenue Service [which] *indicated*" that Mr. Shapiro had engaged in such activity, and
>
> (b) "money transfers from an individual since convicted of selling hashish, who stated that the transfers were for hashish supplied to him by Samuel Shapiro"

See Govt. Br., 10 n. 7 (Conde Aff.).

Does the assertion included in paragraph (a) above suffice to meet a claim of arbitrariness? Given the anonymity and generality of the information "supplied" and the fact that it only "indicated" the factual conclusion, we submit that it is not enough – even under the court of appeals' looser test – to meet the assertion that the assessment was made in bad faith. Subparagraph (b) adds, however, at least one specific informant – whose reliability is unknown and whose identity is totally concealed. A court might possibly consider both paragraphs together and say that this is enough – albeit barely – to warrant the requisite inference that the accusation that Mr. Shapiro dealt in hashish was made in good faith and was not totally arbitrary.

Plainly, however, the two paragraphs do not add up to probable cause. The first is, in substance, precisely what was held hopelessly insufficient in *Aguilar v. Texas,* 378 U.S. 108 (1964), which this Court again reaffirmed in *United States v. Harris,* 403 U.S. 573, 578 (1971), where it viewed as constitutionally inadequate any affidavit which is a "mere affirmation of suspicion and belief." The second paragraph fails because there is neither any way of knowing through how many levels of hearsay the information has filtered (the revenue agent did not swear that he

had spoken to the informant nor did he indicate how the information had come to him) and there is absolutely no basis – much less any "substantial basis" (as required by *Harris* and by *Jones v. United States*, 362 U.S. 257 (1960)), to credit the hearsay. Indeed, the anonymous informant's narcotics conviction is reason for *disbelieving* his testimony about others, not reason for crediting it.

Fatal to the government's contention, however, is the total absence of any basis for the revenue agent's projection of full-year profits. Surely, if the government chooses to proceed against suspected narcotics violators by seizing their assets for nonpayment of taxes rather than by criminal prosecution for narcotics violations,[30] the government should not be permitted to avoid the proof that goes with a tax case. Even if the six payments were for transfers of hashish, there is no basis whatever for assuming that such payments were made at any other time during the year. Nor should guess, speculation and surmise based on "known practice in hashish trafficking" and on "common practice in hashish dealing" be permitted as a substitute for valid evidence here than it would be in any lawful business. May an annual income be similarly projected for an individual who has sold six automobiles – without a scintilla of proof that he operates a car dealership?

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30 At the hearing of December 21, 1974 – less than three hours after the narcotics allegation was first made known by delivery of the Notice of Deficiency – one of Mr. Shapiro's attorneys – formerly an Assistant Attorney General in charge of the Criminal Division – noted in open court that if the allegation was true, federal criminal charges should be brought. It is now 20 months later, and no such charges have been filed.

Would it be permissible for the IRS to assess an architect – assuming he is regularly in the business – on a similar "projection" of six contracts? We believe that any court would find such an assessment both arbitrary and excessive. It is more – and not less – so when the allegation is that the taxpayer's conduct has been criminal.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

HERBERT J. MILLER, JR.
NATHAN LEWIN
MARTIN D. MINSKER

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N. W. – Suite 500
Washington, D. C. 20037
(202) 293-6400

Attorneys for the Respondents

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL SHAPIRO and BELLA SHAPIRO, *Plaintiffs,*	:	
v.	:	**Civil Action No. 2172-73**
SECRETARY OF STATE, *et al.*, *Defendants.*	:	

[Filed May 30, 1974]

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, plaintiffs hereby move for the entry of summary judgment in their favor in this action on the ground that there is no dispute as to the fact that plaintiff Samuel Shapiro was given no notice whatever before the "Notices of Levy" were served on his New York banks and before a lien was filed in the county where he and his wife own a home.

As grounds for the entry of the judgment requested, plaintiffs rely upon the opinion of the Court of Appeals for the District of Columbia Circuit remanding this case to this Court, particularly on footnote 12 at pages 6-7 of the said opinion. Plaintiffs also rely on paragraph 18 of the verified complaint herein, wherein the plaintiff Samuel Shapiro stated under oath that "without any prior notice or warning whatever" the "Notices of Levy" were filed upon banks in New York and plaintiffs' assets were seized. Pursuant to Rule 1-9(g) of the Rules of the United States District Court for

the District of Columbia, plaintiffs are submitting together with this motion a statement of the one material fact relevant to this motion as to which there is no genuine issue – *i.e.*, that there was no notice whatever given to Samuel Shapiro before the "Notices of Levy" were served on the banks.

WHEREFORE, plaintiffs respectfully request that this Court enter summary judgment for the plaintiffs and issue a permanent injunction against the peremptory seizure of plaintiffs' assets caused by the issuance of the "Notices of Levy" and the jeopardy assessment made in this case.

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ NATHAN LEWIN
Nathan Lewin

/s/ MARTIN D. MINSKER
Martin D. Minsker

MILLER, CASSIDY, LARROCA
& LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 293-6400

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Filed May 30, 1974]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On May 15, 1974, the Court of Appeals remanded this case to the District Court for further proceedings in which a record might be developed to support a ruling on the complaint and any motions filed herein. It is the plaintiffs' view that the full discovery which was not had prior to this Court's ruling on the defendants' motion to dismiss would result in a factual record that would require the entry of judgment for the plaintiffs. It is not, however, necessary to engage in this full discovery procedure since, under the ruling of the Court of Appeals, there is a much more clear-cut and simple ground for the entry of judgment in favor of the plaintiffs.

At pages 6-7 of the Court of Appeals' slip opinion (a copy of which is attached hereto for the convenience of the Court), the Court of Appeals noted that any levy pursuant to a jeopardy assessment must follow "prior notice of the demand for payment." The Court of Appeals stated, in footnote 12 of this opinion, as follows:

> The power to levy is inoperative until the subsequent "failure or refusal" of the taxpayer to pay the required amount. In the present case there are allegations that the Commissioner failed to provide the taxpayer the required notice prior to serving "Notices of Levy" on the taxpayer's New York banks. If so, then the Commissioner may well have violated Shapiro's right to due

process. *See, e.g., Mrizek v. Long,* 187 F. Supp. 830, 835 (N.D. Ill., 1959):

> . . . If plaintiffs are being thus deprived of their property by administrative action purporting to conform, but failing to conform, to the requirements of Section 6331, the plaintiffs have sufficiently alleged deprivation of property without due process of law in violation of the Fifth Amendment.

If proven, this alleged failure by the IRS to adhere to the statute might well be sufficient basis for an injunction against the levies, assuming the presence of the other essentials of equitable jurisdiction. Certainly, such a failure would vitiate much of the good faith presumption accorded the IRS in these matters. *See* text, *infra,* at note 30. But absent an express finding of fact by the District Court, we are reluctant to lend dispositive weight to the untested allegations in appellant's brief.

The verified complaint filed in this case alleged that there was no notice whatever to the taxpayer from the Internal Revenue Service before the time that the levies were served. Indeed, the defendants have never contended otherwise, and it is clear from the entire course of conduct from and after December 6, 1973, that the service of these notices was a total surprise to the plaintiffs.

This failure by IRS invalidates totally the notices served on December 6, 1973, and requires the release of all funds and an injunction against the issuance of any levies or jeopardy assessments. Together with this motion, we have filed a Statement of Material Facts As To Which There Is No Genuine Issue, in which we assert that the absence of notice

is uncontested. The IRS's failure to serve such notice constitutes a violation of the taxpayer's Fifth Amendment rights and requires the entry of an injunction in this case.

Respectfully submitted,

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ NATHAN LEWIN
Nathan Lewin

/s/ MARTIN D. MINSKER
Martin D. Minsker

MILLER, CASSIDY, LARROCA
& LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 293-6400

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 1-9(g) of the Rules of the United States District Court for the District of Columbia, plaintiffs hereby assert the following material fact as to which there is no genuine issue:

1. Samuel Shapiro was given no notice by the Internal Revenue Service or any agent thereof of any claimed tax liability prior to the time that "Notices of Levy" were served on his New York banks and others who had custody of his funds on December 6, 1973.

Respectfully submitted,

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ NATHAN LEWIN
Nathan Lewin

/s/ MARTIN D. MINSKER
Martin D. Minsker

MILLER, CASSIDY, LARROCA
& LEWIN
1320 19th Street, N.W.
Washington, D.C. 20036
(202) 293-6400

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Filed May 30, 1974]

CERTIFICATE OF SERVICE

I, Nathan Lewin, hereby certify that on May 29, 1974, I caused to be mailed to Robert T. Rankin, Esq., Office of the United States Attorney, United States Courthouse, John Marshall Plaza, Washington, D.C. 20001, by first-class mail, prepaid postage, a copy of the plaintiffs' Motion for Summary Judgment, Statement of Material Facts as to Which There is No Genuine Issue, Memorandum of Points and Authorities in Support of Motion for Summary Judgment and Proposed Order.

/s/ NATHAN LEWIN
Nathan Lewin

Attorney for Plaintiffs

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Received October 11, 1974]

RESPONSE TO THE MOTION FOR
SUMMARY JUDGMENT FILED BY THE PLAINTIFFS

Now comes the Commissioner of the Internal Revenue Service, by his attorneys, and responds to the plaintiffs' Motion for Summary Judgment as follows.

As can be seen from the affidavit attached hereto as Exhibit A, notice of and demand for payment of the jeopardy assessments was made on December 6, 1973. The records of the Internal Revenue Service apparently do not reflect at precisely what time the notices and demand for payment of the jeopardy assessments were placed into the United States mails. Thus, although the notices and demand were given on the same date as the assessments were made and the levies served, all within a few hours of each event, we are unable to ascertain whether the notices and demand were given before, contemporaneously with, or after the service of the levies. Accordingly, the Commissioner of the Internal Revenue Service is now willing to concede that the levies served on December 6, 1973, were defective and he now plans to serve new notices of levies on Friday, October 11, 1974. However, the Commissioner will not demand an immediate turnover of the funds pursuant to these new levies.

Insofar as the Motion for Summary Judgment seeks to recover any funds already collected pursuant to levies that were honored heretofore, any relief with respect to lifting the levies is moot and any relief with respect to releasing

any liens or the return of any such funds is premature until either the Tax Court of the United States determines that no deficiency exists or this Court makes the necessary factual finding in accordance with the mandate of the Court of Appeals that no factual foundations for the Commissioner's actions making the jeopardy assessment existed and an action seeking the refund of taxes paid is properly filed pursuant to Section 7422 of Title 26 U.S.C.

/s/ JOHN J. McCARTHY
John J. McCarthy, Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

/s/ STEPHEN G. FUERTH
Steven G. Fuerth
Assistant Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Of Counsel:

EARL J. SILBERT
United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

SAMUEL SHAPIRO and BELLA SHAPIRO,
Plaintiffs,

v.

SECRETARY OF STATE, *et al.*,
Defendants.

Civil Action No. 2172-73

AFFIDAVIT

STATE OF NEW YORK :
COUNTY OF SUFFOLK: SS:

HENRY P. SEUFERT, being duly sworn, deposes and says:

1. He is the Director, Brookhaven Service Center, Holtsville, New York, and has served in that capacity since his appointment by the Commissioner of Internal Revenue on August 5, 1973, and as said Director, he is responsible for the assessment of all federal taxes within the Region covered by the said Service Center.

2. He certifies that he has caused a search to be made of the records of the Director, Brookhaven Service Center, Holtsville, New York, and that the official records of his office show that jeopardy assessments for individual income taxes for the calendar years 1970 and 1971 were made against Samuel Shapiro, 208 Maple Avenue, Monsey, New York on December 6, 1973 and in amounts as more fully set forth as follows:

Taxable Period	AMOUNT OF ASSESSMENT Tax	Penalties	Interest	Assessed Balance
1970	$ 5,137.89	$1,705.79	$ 814.11	$ 7,657.79
1971	79,368.50	3,968.48	7,774.85	91,111.83

3. That the official records of the Director, Brookhaven Service Center, Holtsville, New York, show that on December 6, 1973, Department of Treasury Forms 17-A were mailed to Samuel Shapiro giving him Notice of and making demand for payment of said jeopardy assessments.

4. Attached to and hereby made a part of this affidavit are copies of Department of Treasury Forms 17-A which were mailed to Samuel Shapiro on December 6, 1973.

/s/ HENRY P. SEUFERT
Henry P. Seufert
Director, Brookhaven
Service Center

Subscribed and sworn to before me this 28th day of August, 1974.

/s/ JAMES T. ANDERSON
Notary Public
James T. Anderson
Notary Public, State of New York
No. 52-4515 32
Qualified in Suffolk County
Commission Expires March 30, 1975

- - - - - - - - - - - - - -

Department of the Treasury
Internal Revenue Service
Form 17-A

132-32-8801
SAMUEL SHAPIRO
208 MAPLE AVE
MONSEY NY 10952

JEOPARDY

50

23C 12 06 73
7012
1040
IRC 6861

FOR IRS INFORMATION ONLY

13647-340-20000-73
Document Locator Number

Reference and date	Assessment*	Amount paid	Balance due
12-06-73	5,137.09		
0 PEN.	1,264.47		
I: JEN	256.90		
R INT	214.11		
JEO	134.42		

Statement of Tax Due IRS

This Copy Is For Your Records

* "P" means penalty
"I" means interest

This bill is for additional Federal tax due, based on an audit of your tax return for the period shown. Please pay the amount shown as "Balance due" within 10 days from the date of this notice.

If you need to contact us about your account, please include the Document Locator Number (shown in the address block above) in your letter.

TY 26 (REV. 8-70) PART 3

Thank you for your cooperation

Date of this notice

12a

Department of the Treasury
Internal Revenue Service
Form 17-A

132-32-8801
SAMUEL SHAPIRO
208 MAPLE AVE
MONSEY NY 10952

JEOPARDY

50

23C 12 06 73
7112
1040
IRC 6861

FOR IRS INFORMATION ONLY

13647-340-20001-73
Document Locator Number

Reference and date	Assessment*	Amount paid	Balance due
12-06-73	79,363.50		
0 PEN	3,968.48		
R INT	7,774.85		
			91,111.83

Statement of Tax Due IRS

This Copy Is For Your Records

* "P" means penalty
"I" means interest

This bill is for additional Federal tax due, based on an audit of your tax return for the period shown. Please pay the amount shown as "Balance due" within 10 days from the date of this notice.

If you need to contact us about your account, please include the Document Locator Number (shown in the address block above) in your letter.

TY 26 (REV. 8-70) PART 3

Thank you for your cooperation

Date of this notice

13a

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

* * * * *

MEMORANDUM OF LAW IN SUPPORT OF
THE RESPONSE TO THE MOTION FOR
SUMMARY JUDGMENT FILED BY THE PLAINTIFFS

This is an action wherein the plaintiff sought to enjoin the United States from executing a certain warrant for the extradition of the plaintiff Samuel Shapiro, or in the alternative, to cause the defendant, the Commissioner of Internal Revenue, to lift certain notices of levy which were served to collect a jeopardy tax assessment made on December 6, 1973. The Government filed a motion to dismiss the plaintiffs' complaint and on December 21, 1973, this Court entered its order dismissing the action. On December 26, 1973, the plaintiff filed a notice of appeal with respect to the order of dismissal appealing this action to the United States Court of Appeals for the District of Columbia Circuit.

On May 15, 1973, the United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part the decision of this Court and remanded the case to this Court for further proceedings so as to allow the District Court an opportunity to develop a record that adequately supports the ruling on the Government's motion to dismiss with respect to the tax aspects of this case. Thereafter, on May 29, 1974, the Commissioner of Internal Revenue, filed a petition for rehearing with the United States Court of Appeals for the District of Columbia Circuit. On or about May 29, 1974, the plaintiffs also filed a Motion for Summary Judgment in the District Court. The defendant then filed a Motion to Strike the Motion for Summary Judgment or in the alternative to Stay All Further Proceedings with Respect

to Plaintiffs' Motion for Summary Judgment. On July 3, 1974, this Court entered an Order staying the requirement that the defendant respond to the Motion for Summary Judgment pending the District Court's receipt of the mandate of the United States Court of Appeals for the District of Columbia. On July 17, 1974, the Motion for Rehearing before the Court of Appeals was denied. The Commissioner now responds to the Motion for Summary Judgment as required by the Order of this Court entered on September 19, 1974, and submits this memorandum of law in support thereof.

FACTS

On December 6, 1973, jeopardy assessments for the years 1970 and 1971 were made against the plaintiff Samuel Shapiro and notices and demand for the payment of said jeopardy assessments were mailed on the same date. (See affidavit attached as Exhibit A to Response to Plaintiffs' Motion for Summary Judgment.) Also on December 6, 1973, notices of levy were served on a number of institutions. (See Exhibits A, B, C, D and E to plaintiffs' Complaint.) The records of the Internal Revenue Service apparently do not disclose at precisely what time the notices and demand for payment of the jeopardy assessments were placed in the United States mails. However, since the notices of levy were served at varying times between 1:15 p.m. and 2:40 p.m. on December 6, 1973 (see Exhibits A through E attached to plaintiffs' Complaint), it is clear that the notices and demand were mailed within a few hours of the service of the notices of levy and could have been mailed prior to, contemporaneously with, or shortly after the making of the assessments. Additionally, while not now in the record before this Court, notices of liens pursuant to the provisions of Section 6323 of Title 26 U.S.C. were properly filed with the appropriate recording official in the State of New York.

Since the date the levies were served some of the levies were honored. Specifically, the Court is advised that the levy served upon the Nanuet National Bank and Fred Topper were honored on June 14 and June 4, 1974, respectively, and $10,854.73 was received pursuant to that levy. The levy served upon the Dime Savings Bank was partially honored and the proceeds of a joint checking account in the amount of $1,172.84 was received. A safety deposit box at the Empire National Bank was opened pursuant to a levy served upon the bank on December 13, 1973, by the plaintiff Bella Shapiro, the contents therein were inventoried and were released with the exception of $250 in United States Savings Bonds and a man's watch. There remains unhonored levies served upon the Chemical Bank, the Dime Savings Bank, the First National City Bank,[1] the Empire National Bank, and the National Agency Managers, Inc. Plaintiffs have now filed a Motion for Summary Judgment seeking to have the Commissioner withdraw all notices of levy and all other documents filed anywhere in the United States which purport to seize, attach, or otherwise claim any interest in the property of Samuel Shapiro or his wife Bella Shapiro, and that the Commissioner of Internal Revenue release all funds now held by him and by the Internal Revenue Service pursuant to the notices of levy issued on December 6, 1973.

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[1] This levy was served on December 7, 1973.

ARGUMENT

I

THE NOTICES OF LEVY SERVED ON DECEMBER 6, 1973, MAY BE TECHNICALLY DEFECTIVE

As is pointed out above, on December 6, 1973, jeopardy assessments were made against the plaintiff Samuel Shapiro pursuant to the provisions of Section 6861 of Title 26 U.S.C. As can be seen from Exhibit A attached to the Commissioner's response, notice and demand for the payment of these assessments was also made on December 6, 1973.

The only question now before the Court is whether notices and demand preceded the service of the notices of levy and, if not, whether the failure to give prior notices and demand constituted the denial of due process. (See footnote 12 of the Court of Appeals decision.) As is pointed out above, it is clear that the assessments, the notices and demand, and the service of the notices of levy were made in the space of a few hours and the notices and demand may well have preceded the notices of levy or may have been made contemporaneously therewith. In view of this technical defect in the making of the levies, the Commissioner of Internal Revenue now concedes that such levies are technically defective and he now plans to serve new notices of levies on Friday, October 11, 1974. However, the Commissioner will not demand an immediate turnover of the funds pursuant to these new levies. However, it should be noted that any defect in the service of levies does not in any way invalidate the assessments, but merely affects the enforceability of the levy. The assessments involved herein clearly were made in a procedurally correct manner. As noted prior hereto, the assessments were made on December 6, 1973.

When jeopardy assessments are made as is the case here, Section 6861(b) of Title 26 U.S.C. requires that the Commissioner mail within 60 days to the taxpayer a statutory notice of deficiency which entitles a taxpayer to petition the United States Tax Court for a redetermination of such deficiency and assessment. In the present case this notice was mailed to the taxpayer on December 21, 1973 (see the Supplemental Response to Plaintiffs' Interrogatories filed December 21, 1973), which was within 15 days of the making of the assessment.[2] Further, the notices and demand for payment with respect to the making of such assessments were properly and timely given within the 60-day period set forth in Section 6303 of Title 26 U.S.C., since the notices and demand were mailed on the same date that the assessments were made.

The right to serve notices of levies set forth by Sections 6331, *et seq.*, of Title 26 U.S.C. is merely an administrative tool whereby a tax can be collected and is not a necessary prerequisite to the making of a valid assessment. Accordingly, since it is clear that the assessments are procedurally correct any technical defect with respect to the levies can only affect such levies and not the underlying assessments and/or the liens created by the provisions of Sections 6321 and 6322.[3]

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[2] Pursuant to this statutory notice of deficiency, the plaintiff exercised his right to relief in the United States Tax Court by filing a petition for the redetermination of the deficiency so asserted and is presently actively pursuing this relief.

[3] It should also be noted on December 6, 1973, immediately subsequent to the making of the assessments, notices of tax lien were filed pursuant to Section 6323 of Title 26 U.S.C. so as to give any other creditors notice of the liens outstanding against the plaintiff Samuel Shapiro.

II

EVEN IF THE LEVIES MADE ON DECEMBER 6, 1973, ARE DEFECTIVE, THE TAXPAYER IS NOT ENTITLED TO THE RETURN OF ANY MONEYS HERETOFORE COLLECTED PURSUANT TO THE LEVIES

As is pointed out above, any defect in the making of the levies does not in any way invalidate the assessments or the liens created by the assessments, but rather, they merely affect the enforceability of any levies. It therefore follows that before the plaintiff is entitled to the refund of any moneys collected which have been applied to his tax liability he must establish that he does not owe any taxes, *i.e.*, either the Tax Court must determine that the deficiencies set forth in the statutory notice of deficiency mailed to him on December 21, 1973, were not proper or this Court, after an action properly filed for the refund of taxes paid, pursuant to Section 7422 of Title 26 U.S.C. and Section 1346(a)(1) of Title 28 U.S.C. must determine that he does not owe any taxes and is entitled to a refund thereof. This question most certainly cannot on the Motion for Summary Judgment now before this Court be resolved. It should be deferred until such time as the Tax Court enters its decision on the issue of the taxpayer's liability or in any event, should be deferred until this Court makes its factual finding with respect to the basis of the making of the assessment as is required by the mandate of the Court of Appeals. In the event this Court elects to proceed to make a determination in accordance with the mandate of the Court of Appeals, it is questionable whether this Court could convert the present action into an action for the recovery of taxes pursuant to the provisions of Section 7422 since, if this action is deemed to be an action for the refund of taxes, it would have automatically been stayed by the provisions of Section 7422(e) upon

the filing by the plaintiffs of their petition with the United States Tax Court. Therefore, it is respectfully submitted that any determination as to whether the plaintiff Samuel Shapiro is entitled to the return of any moneys is premature and must be deferred until such time as either the Tax Court enters its decision and/or this Court makes its factual determination as required by the mandate of the Court of Appeals and the stay provided for by Section 7422(e) is lifted.

Respectfully submitted,

/s/ JOHN J. McCARTHY
John J. McCarthy, Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

/s/ STEPHEN G. FUERTH
Stephen G. Fuerth
Assistant Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Of Counsel:

EARL J. SILBERT
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to the Motion for Summary Judgment Filed by the Plaintiffs and Memorandum of Law in Support of the Response to the Motion for Summary Judgment Filed by the Plaintiffs was served upon counsel for the plaintiffs, Nathan Lewin, Esquire, 1320 19th Street, N.W., Washington, D.C. 20036, this 10th day of October, 1974, by United States mail, postage prepaid.

/s/ STEPHEN G. FUERTH
Stephen G. Fuerth

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

[Filed October 29, 1974]

ORDER

Upon consideration of the Plaintiffs' Motion for Summary Judgment filed on May 30, 1974, and the opposition thereto, and it appearing to the Court that the government has effected a second set of levies upon Plaintiffs' assets, it is by the Court this 29th day of October, 1974,

ORDERED that Plaintiffs' Motion for Summary Judgment be and the same is hereby denied, without prejudice, as moot; and it is

FURTHER ORDERED that Defendants file with the Court and serve on the Plaintiffs by October 31, 1974, the factual submission upon which the government seeks to rely as providing a factual foundation that Plaintiff Shapiro was a narcotics dealer and that the government's calculation of the deficiency has a rational basis, so that the Court can determine if the claim is "entirely excessive, arbitrary, capricious, and without factual foundation." *See Shapiro v. Secretary of State,* No. 73-2260 (D.C. Cir., May 15, 1974), at 10; *Lucia v. United States,* 474 F.2d 565, 573 (5th Cir. 1973). And it is

FURTHER ORDERED that a hearing in this matter will be held on November 5, 1974, at 9:30 a.m.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

[SEAL]

APPENDIX D

[Letter of Nathan Lewin to District Director of Internal Revenue dated December 11, 1973 (Exhibit 4 to complaint)]

LAW OFFICES

MILLER, CASSIDY, LARROCA & LEWIN

1320 19th Street, N.W. - Suite 500

Washington, D.C. 20036

Area Code 202

Telephone 293-6400

December 11, 1973

District Director of Internal Revenue
120 Church Street
New York, New York

Attention: Mr. Victor F. Godfrey

Subject: Samuel Shapiro
4 Joan Lane
Monsey, New York 10952
Identifying No. 132-32-8801

Dear Sir:

On December 6, 1973, your office issued Notices of Levy with regard to the above taxpayer on the following:

(1) Chemical Bank, Route 59, West Nyack, New York 10960;

(2) Nanuet National Bank, Route 59, Monsey, New York;

(3) The Dime Savings Bank, Fifth Avenue at 48th Street, New York, New York;

(4) Fred Topper, 85 Baxter Street, New York, New York.

On that same date a Notice of Seizure was also served on the Empire National Bank, 102 Route 59, Monsey, New York. With regard to the above five actions, I received copies of the forms at the office of the Internal Revenue Service on December 10, 1973. I have also been advised that a lien was filed in Rockland County, New York, to cover all real property owned by Mr. Shapiro.

This action was taken by the Internal Revenue Service with knowledge that on Sunday, December 9, 1973, Mr. Shapiro would be surrendering voluntarily at the United States Courthouse, New York, New York, for departure to Israel under an extradition warrant. The terms of this surrender were negotiated in great detail between myself, as counsel for Mr. Shapiro, the Department of State, and the Government of Israel, and the terms were known to the Department of Justice. As reflected in a letter to me from the Department of State dated September 19, 1973, the assurances to Mr. Shapiro by the Government of Israel were the following (these are quoted precisely as stated in the letter to me):

"(1) That extradition be delayed until after the birth of his child, expected in November, and the religious ceremonies incidental to this birth;

(2) That Shapiro be allowed to remain at large in Israel until acquittal or conviction; and

(3) That trial be continuous."

These three terms were specifically the subject of formal Diplomatic Notes which were exchanged between the United States and Israel on August 16, 1973, September 4, 1973, and November 9, 1973. The first of these conditions came

to pass on November 15, 1973, when Mrs. Shapiro, a native-born American citizen, gave birth to a girl in New York. Pursuant to further discussion with the Department of State and representatives of the Government of Israel and of the Department of Justice (which was representing Israel in judicial proceedings pursuant to treaty), it was agreed that Mr. Shapiro would leave the United States on December 9, 1973. In the course of these discussions it was made clear to all parties by me that in order to achieve the second of the above conditions, the funds which Mr. Shapiro presently has in the United States and which are pledged as security for his appearance in the extradition proceeding and in the proceeding before the Immigration and Naturalization Service would be needed and would be used to secure his release on bail in Israel. At the suggestion of an official of the Embassy of Israel, arrangements were made with Bank Leumi for the deposit of those funds with a branch of that bank in New York upon the exoneration of bail when Mr. Shapiro leaves the United States. On the basis of that security and whatever else could be scraped together by his family in Israel, a branch of Bank Leumi in Israel is ready to issue the necessary bank guarantee to enable Mr. Shapiro to be free on bail until his trial on the charges pending in that country.

It came as a total surprise to me and to Mr. Shapiro to learn for the first time on December 6, 1973 – three days before he was scheduled to leave the United States for an extended period – that there was some question about his tax obligations in this country. No prior suggestion had been made to him from any source about any such issue, and there was never a request for an audit. Officials of both the Department of State and the Department of Justice with whom I communicated when I heard of the jeopardy assessments on December 6, advised me that they had no prior notice that this would happen and, using their words, that they were "shocked" by this action.

As matters stand now, Mr. Shapiro's extradition has been rescheduled for December 16, 1973. If he were to leave the United States with the Notices of Levy in full force and effect, the consequence would be that he would not have the funds for bail in Israel, and that he would, accordingly, be in jail until his trial. He is anxious to resolve the matter of his alleged tax liability as quickly as possible, and he has repeated to me several times that he is firmly of the view that he has no tax liability and that his tax returns were accurate. He is prepared to litigate the question at the earliest possible time and would go into Tax Court to challenge any notice of deficiency promptly upon its issuance.

It appears quite clear, I would think, that it would be a denial of Mr. Shapiro's right to contest the alleged tax liability and of his right to the assistance of counsel in this regard if the United States denies him the opportunity to litigate and to be available to his attorney. By freezing his assets, as it has done with these Notices of Levy, it has, for all purposes, achieved that result.

As I am sure you are aware, the courts have sustained the jeopardy assessment procedures and have found them to be within constitutional bounds *only* on the premise that they provide a taxpayer with a fair opportunity to contest the findings of liability within a prompt period after his assets are frozen. By surrendering Mr. Shapiro pursuant to the extradition requests on the one hand and freezing his assets so that he cannot make bail in Israel on the other, this constitutional premise for the jeopardy assessment procedure is eliminated.

Moreover, the situation is aggravated by the fact that Mr. Shapiro, on my advice, voluntarily surrendered his right to Supreme Court review of the legal questions relating to his extradition in exchange for an understanding from the United

States, acting through the Department of State, and from the Government of Israel that certain conditions, including pretrial release, would apply upon his voluntary return to Israel. By now freezing his assets, the United States – acting through the Internal Revenue Service – has breached this term of its agreement.

As I stated previously, we are ready and anxious to resolve the matter of tax liability administratively, or in an appropriate court, at the earliest possible time. That goal could be accomplished by permitting Mr. Shapiro to remain in the United States until this question is resolved. There have, however, been solemn international obligations assumed in this regard, and Mr. Shapiro has agreed – and is now fully ready – to return to Israel under the terms of those agreements. In these circumstances, it behooves the Internal Revenue Service to work out an arrangement under which the tax liability question may be resolved while he and his family are given due process of law. Since Mr. Shapiro's wife and child will remain in the United States and since he and his wife jointly own real property located in Rockland County, I would think that the Internal Revenue Service's interest in collecting any possible judgment is substantially protected by the lien filed on real estate. If, however, the Internal Revenue Service should deem it necessary to have some additional security, I propose the following arrangement:

(1) The funds which are now the subject of the Notices of Levy – and which are, I might add, presently being held as security for his appearances before the Immigration and Naturalization Service and in the United States District Court for the Southern District of New York – would be deposited in the New York branch of Bank Leumi as partial security for that bank's guarantee in Israel of the bail to be posted upon Mr. Shapiro's return to that country, which amounts to 250,000 Israeli pounds (approximately $60,000).

(2) An agreement could be entered into under which the Internal Revenue Service would have a security interest in those funds second only to the interests of the Government of Israel (or the bank, if it is required to pay on its guarantee) to secure against any tax liabilities determined after administrative resolution or litigation of the tax claim.

This arrangement would, I submit, adequately protect the Internal Revenue Service's interest while permitting Mr. Shapiro – albeit under extremely difficult circumstances – to defend against tax claims now being made. If such an accommodation can not be arranged, it is patent that Mr. Shapiro and his family are being denied due process of law – a constitutional right which is absolutely guaranteed to them. It should not be forgotten, in this regard, that what he is leaving in the United States is a baby not yet one month old and his wife – both of whom will be living under extremely strained circumstances occasioned not only by his absence but by the fact that all the funds that he has available will be frozen to permit him to be released while he is in Israel.

I am sure I need not impress upon you the need for an immediate resolution of this question, involving as it does sensitive international relations. I am sending this letter to you on the day after I met with agents of the Internal Revenue Service (and was able to receive from them no detailed information regarding the alleged liability), and I urge you to act on this request with the dispatch that it obviously deserves.

Sincerely yours,

Nathan Lewin

NL/pc

APPENDIX E

[Remarks by Donald C. Alexander Commissioner of Internal Revenue prepared for delivery before the annual convention of the tax section of the American Bar Association, Honolulu, Hawaii, August 14, 1974, 1:00 P.M., HDT*]

Within bureaucratic circles, the IRS is regarded as one of the Federal Government's best organized and best managed agencies. Now, as some of you outside of the public sector are aware, I have undertaken to make a number of changes in the operations of the Internal Revenue. In spite of that fact, I would concur that I find the Service to be, on the whole, an effectively managed institution staffed predominately with high caliber professional personnel. I am, of course, very pleased that this is the case and that I am able to stand here before you this afternoon and tell you so.

However, in all candor, I *could* wish that the Service's image wasn't quite as good as it is among the leadership of the Federal establishment. In fact, once I even considered – but rejected – the possibility of leaking some trumped-up stories to the press about how poorly we were doing in some areas, so the other Federal planners and executives would leave us alone and quit trying to give us additional responsibilities, particularly in the non-tax areas.

---

* 6:00 P.M., EDT

NOTE: This text is the basis of Commissioner Alexander's oral remarks. It should be used with the understanding that some material may be added or omitted during presentation.

My discussion of the Service's management image is by way of setting the stage for my topic this afternoon, "Redefining Tax Administration". One of the results of the reorganization which the Service went through in the early 1950's was that it came out of that exercise with a very modern, orderly organizational hierarchy. A good hierarchial structure, when you see it on a wall chart, looks rather like a pine tree – you know, like a child's image of a Christmas tree. The IRS has presented such an attractive Christmas tree to the various Federal policy makers and planners over the past 15 or so years, that they hung a number of ornaments on us that did not really belong there.

During that period of time, the Service became involved with the enforcement of the expanded Fire Arms Control Act, information gathering for Revenue Sharing, the Economic Stabilization Program, the enforcement of Federal energy conservation activities during the past eight months or so, and presently some are talking about the possibility that the Service would be the organization to administer the income maintenance or so-called "negative income tax" program for reforming the Nation's welfare system.

In this particular case, they have said, "Now, the Internal Revenue is so well organized and so well managed that it would carry off the job most effectively". But surely the Internal Revenue Service does not have a monopoly on effective techniques of organization and management in the Federal Government. Then it was suggested that this program, which is admittedly going to be a very sensitive one regardless of who administers it, would be better placed in the Internal Revenue Service because Congress won't interfere with us as much as they would with other agencies. A response to that is found in a volume of transcripts from the Montoya hearings almost a foot thick. You know, I have spent a lot

of my time with the Senator and his committee during the past year. But then they said the Internal Revenue Service would be *less emotional* about running this very controversial program. Well, maybe tax men are a little more calculating and rational then social scientists and economic planners. But all they've really said is that it's going to be a hard job to do right; well, so is tax administration!

Now, I don't mean to imply that the IRS will shirk its duties. If something is really part of the tax system, it is indeed our responsibility. But it doesn't become part of the tax system simply because it may be labeled as such. Having said that, I will now say that if a job is assigned to us in the future, we will do our best to do it – just as we have done in the past.

Tax administration is always going to be a hard job. What's more, no matter how well IRS does it, there will always be room for improvements. I would like to discuss with you this afternoon some of the things that we have done, that we are doing, and that we are going to try to do in order to improve Federal Tax Administration.

It is no accident that I have chosen to group these efforts to improve our management of the nation's Revenue laws under the title "Redefining Tax Administration". Over a period of years, the definition of "Tax Administration" has been altered and expanded to the point that some of our important basic goals and responsibilities have either been subsumed or jeopardized. This diffusion of purposes and resources has been brought about, in large part, by three different sets of influences. The first has been through placing additional responsibilities upon the tax administration organization. The second has been through the use of the existing tax procedures and powers for purposes other than those of the tax system itself. The third, of lesser concern to the

tax administrator, has been through the revision and expansion of the Internal Revenue Code to include provisions whose principal purpose is other than that of raising revenue or defining what should be taxed. Each of these actions or, rather, groups of actions, has had an influence upon the manner in which the definition of "Tax Administration" has evolved over the years. These same influences have also affected the manner in which the Tax Administration charter has been carried out.

Even prior to my coming with Internal Revenue, I had become concerned with the degree to which I believed that some of these factors were impinging upon the administration of our tax laws. My experience as Commissioner quickly showed me that my concern was well placed, and I began to take steps to ameliorate this situation. I would like to spend the next few minutes discussing some of the results of these efforts.

With respect to removing the inappropriate ornaments from the IRS Christmas tree, I believe we have made very good progress. The Alcohol, Tobacco, and Firearms organization was transferred from the IRS to the direct jurisdiction of Treasury Department in 1972. Still, the Internal Revenue continued to provide its former component with administrative support in a very large way throughout Fiscal Year 1972. Today, however, the Alcohol, Tobacco, and Firearms Bureau of the Treasury is very largely on its own, and the support resources which the IRS had been expending on the ATF organization are now once again available full time to support the business of Tax Administration.

Of course, in a more dramatic and massive area of activity, the Service divested itself of its enforcement functions under both the Economic Stabilization and Federal Energy Programs. The death of the Economic Stabilization Program

was mandated by Congress, so we can take little credit for that. However, the Service was under some pressure to retain some of its enforcement functions for the Federal Energy Office for an indefinite period of time. I am pleased to say that we successfully managed to stave off that particular initiative.

Although none of the three activities I have just mentioned affected our interpretations of the tax laws or the manner in which we administered them, they did affect the levels of service which we were able to provide, and in some cases, the quality as well. For example, Taxpayer Service Representatives, whose principal function is to respond to public inquiries and offer assistance to those in need of help in meeting their tax obligations, were seriously affected by our involvement in the Economic Stabilization and energy enforcement activities.

In many locales, taxpayers had to compete with citizens seeking information regarding these other, non-tax activities; and I make no bones about it, we do not have these Taxpayer Service Representatives in sufficient number to meet the legitimate demands of the taxpayers, as it is. Moreover, these Representatives were required to learn and maintain up-to-date operating knowledge of not only the Internal Revenue Code, but the Stabilization and Federal Energy regulations as well. Now, with the departure of these two programs, we anticipate a significant increase in both the quality and quantity of the Taxpayer Service we will be able to provide. We will also be able to return slightly more than 1,000 experienced Revenue Agents to the field and the auditing of tax returns. Added to that, of course, our administrative people will now be able to devote their full time to the support of tax administration.

While the kind of influences which I have just cited have a measurable effect on both the level of resources devoted to the tax administration effort and the quality of that effort, they do not significantly affect the integrity of that effort. There are influences, however, as I indicated earlier which *do* affect that integrity. These influences arise most often when either the framing or the application of tax laws do not have the raising of revenue as their principal objective.

For centuries, governmental power to tax has been used in a multiplicity of ways transcending the simple, straightforward function of raising revenue. Taxation has been used as an agent of morality – witness the traditional taxation on alcohol, tobacco, and other drugs; gaming and amusement devices, etc. Taxation has also been used as a private interest tool – a number of years back, there was a special tax on margarine to make butter more competitive against it. This was pushed through the Congress by the dairy interests, and the Internal Revenue Service administered it during the 1920's and 30's.

Today, fortunately, the United States has only a limited number of such taxes. For those few which we administer, I believe it is of utmost importance to the integrity of the Tax Administration that we do so with impartiality, and, in the absence of any Congressional charter to the contrary, that we place no particular emphasis on any one tax or group of taxes over that which we place upon any other.

For the Internal Revenue Service to place a disproportionate emphasis on collecting one particular tax or enforcing the revenue laws for a particular group of people, in effect, puts the Service in a position of setting itself up as a judge between good and bad in our Society. Clearly, under such circumstances, the IRS ceases to view all taxpayers as being

equal before the law. Such practices by the Service, however rightly viewed and supported by other forces of the Federal Executive, by Members of Congress, or even by a large portion of the population in general, can only serve to the detriment of the integrity of the Tax Administration System. Selective enforcement of tax laws, designed to come down hard on drug dealers or syndicated crime, for example, may be applauded in many quarters, but it promotes the view that the tax system is a tool to be wielded for policy purposes, and not an impartial component of a democratic mechanism which applies equally to all of us. I need not tell you here this afternoon that the Service is already having some public image problems in that respect.

One aspect of this program applies to public institutions across the board. We are victims of our own image making, because, after all, public policy makers, planners and bureaucrats are also members of the public at large. The images which we create with our press releases and our public statements feed back to us and we believe what we are saying and we build on that. Let me give you an example of what I mean. Back in the 1930's, almost by accident, we stumbled upon the efficacy of the Bureau of Internal Revenue in combating organized crime, which had, up to that point, been practically impervious to the standard methods of law enforcement. So, tax problems got Al Capone and a number of the other more notorious luminaries of the criminal world during the 1930's. Internal Revenue performed impressively, and the public, at the urging of the media, was impressed. In fact, we impressed ourselves as well. Gradually, law enforcement officers and public leaders began to see in Internal Revenue a useful tool that they could apply not only to organized crime, but to other areas of criminal activity which were difficult to detect and to prosecute under traditional law enforcement methods.

During the period of social and political turmoil, which began in the 1960's and developed up through the early 70's, the forces of hard-line law and order promoted the use of the Internal Revenue Service as a *generalized tool for criminal law enforcement.* IRS participation in the Organized Crime Drive of the Justice Department and in Federally-led strike forces in the major cities around the country were the first manifestations of this movement. Following that, there came the Narcotics Traffickers program. In part as a result of the adoption of this general philosophy, in 1969 Internal Revenue created a staff to collect information on the financial affairs of a variety of right and left wing organizations. Congressional Committees and others were concerned that these organizations were being used to funnel tax-exempt money into various violent activities. Although this Special Service Staff did nothing but collect information and forward it for review by different functions, I ordered it terminated on August 9, 1973, because its existence implied that the Service was concerned with activities, legal or illegal, that had little direct relationship to the administration of the tax laws. My point in bringing up the Staff and the other special law enforcement applications of the IRS is to indicate the degree to which the orientation of the Internal Revenue Service, and thus, the "definition" of Tax Administration was being altered by its selective use over that period of time.

This reorientation of purpose was manifested by Service operations in a variety of ways, both large and small. An example was the Service's reaction to tax resistance related to the Vietnam War. During the late 1960's, antiwar groups identified nonpayment of the telephone surtax as having great potential to disrupt the tax administration system, and they urged, through their publications and at their gatherings, that people engage in large scale noncompliance with this

tax. Now, the amount of this tax is extremely small – it generally comes to only one or two or three dollars per month for most individuals – while the cost to the IRS to bring its active collection process to bear on such delinquencies is obviously many times in excess of those amounts. The antiwar groups were well aware of this disparity and they made their intentions clear in their public statements. They hoped to bring the nation's tax collecting mechanism to a halt by overwhelming its resources with thousands of tiny delinquent accounts.

Obviously, they did not achieve their objective; nor did they even come close. Still, in some of our largest districts, they did manage to generate a substantial number of delinquent accounts to which the Service's reaction was precisely as they had anticipated. Many Revenue Officer manhours were wasted by deciding to emphasize the collection of these delinquencies, giving them a higher priority than the collection of delinquencies arising in the normal course of IRS operations.

I have ordered a stop to such selective priority-setting. Once again, however, it is not my intention here to debate the correctness of the response to a particular situation. My point here is that the definition of Tax Administration was permitted to stray from its proper emphasis. If our Tax Administration is either permitted or encouraged to respond selectively to such socio-political phenonema as are likely to crop up from time to time in our pluralistic nation, or if it permits itself to be used as a selective tool which places criminal enforcement or other criteria before revenue collection and enforcement, we may be jeopardizing our traditional tax administration processes, both from the standpoint of the most effective use of our resources and from the standpoint of the public's faith in an impartial, non-political tax system.

Now, what have we in the IRS done to "redefine" our working understanding of Tax Administration? In addition to doing away with the Special Service Staff, we have changed the criteria for IRS involvement in antinarcotics and strike force activities. Today, such activities must satisfy the revenue and professional criteria which have long been established within the IRS as guides for channeling our resources. In other words, in the future, special activities will have to compete openly and equally for resources against our regular tax administration activities. At the same time, we are tackling influences which have, over the years, crept into *our own* standard practices and procedures. I have reference not so mucy to manifestations of selectivity such as the telephone surtax situation, but rather to the more subtle incursions into our basic enforcement policies and procedures.

Now, I asm sure you all know the Service's resources have never been sufficient to permit us to audit anything more than a small percentage of the total number of returns that are filed each year. Over the past 25 years, a number of policies and procedures have been developed to assure that the Service, and ultimately the public, get the maximum utility out of their tax collection dollar. Many of these developments have been wise and fair; I am thinking particularly of the Discriminant Function, or DIF technique which, on the basis of mathematically determined criteria, identifies returns whose characteristics suggest a high probability that they contain erroneous items. A measure of the effectiveness of this technique is reflected by the fact that, while roughly 41 percent of our audits generated no change in tax liability prior to the use of the DIF technique, only 28 percent of the returns selected for district audit by our computers applying the discriminant function criteria resulted in no-change determinations.

Our Taxpayer Compliance Measurement Program is also quite effective in identifying areas of noncompliance. We are also constantly improving the quality of our audits as well, both through improved methodology, such as package audits, and through the application of modern technology as represented by our expanding program of computer-assisted audits. While we have been developing these and other sound programs for enhancing our effectiveness, however, we have also evolved some policies and practices which, although initially based upon apparent logic, may have generated counter-productive tax administration decision-making.

For example, the Service has had a long-standing policy which encouraged field personnel to concentrate enforcement efforts on cases with maximum "publicity potential", and stated, in part, that the purpose of criminal enforcement was to make an example of the offender. The original intent of this policy was clear, and laudable to the extent that it achieved its goal – that is, maximizing the deterrent effect arising from those cases which we successfully completed, by assuring that the public in general was made aware of the Service's enforcement activities. However, this policy, like those resulting in an excessive emphasis upon drug dealers or antiwar protesters, could have the effect of directing a disproportionate share of the Service's enforcement efforts and resources toward a relatively small segment of our total population. This might mean that certain other portions of our society would escape their obligations. Both aspects, in my view would seem inappropriate from the standpoint of a fair and impartial administration of the nation's revenue laws.

Along much the same line, our own fascination with the Service's image as a "law enforcement" agency began to affect the manner in which we applied certain of our enforcement policies. For example, a long-standing IRS procedure

cautioned against the uncoordinated pursuit of civil enforcement actions where a criminal enforcement action was pending. The original purpose of this policy was to avoid accidentally imperiling the criminal prosecution potential in such circumstances.

In application, however, the policy gradually led to a situation in which our normal audit and collection activities began to adopt a "hands-off" attitude toward all taxpayers against whom a fraud investigation was pending. This attitude applied regardless of the potential merits of the pending fraud investigation or the degree of relationship between the fraud issues and the legitimate civil actions which the Service might have pending regarding the taxpayer. Now, this was a prime example of public policy being set by bureaucratic momentum;organizational practice translated an otherwise prudent procedure for coordinating certain exceptional situations into a reinterpretation of the basic tax administration charter, whereby the IRS responsibility for equitable assessment and collection of revenue appeared to be subordinated to the goal of criminal law enforcement. As a result of this reinterpretation, normal audit assessment activities could have been delayed, and the collection of tax liabilities could have been jeopardized as taxpayer's assets were either depleted, or removed from ready access. There was a clear potential for the criminal fraud investigation process, originally conceived of as a tool to be used in extreme situations, to become the tail that wagged the IRS civil enforcement watchdog.

During the past several months we have reviewed and revised this entire area, and a new policy statement has been issued. Under the revised policy, the instances when criminal enforcement actions may take precedence over civil enforcement actions are precisely defined, and are far more restricted than they were under the previous policy. As a

general rule, civil enforcement actions for tax liabilities arising from taxable periods other than that for which the taxpayer is under criminal investigation, or involving different types of tax from that for which the taxpayer is under investigation, regardless of the tax period, will proceed concurrently with a criminal enforcement action, except under circumstances in which a district director authorizes suspension of civil enforcement pertaining to a specific individual case.

Further, in cases where civil enforcement actions against a particular taxpayer have been suspended because of a pending criminal enforcement action involving the identical type of tax or identical tax period for that taxpayer, provisions have been made for dropping such a suspension where the collection of the civil liability would be imperiled by continued delay, and where such peril appears to outweigh the criminal enforcement issues. In short, we are moving to assure that we make these decisions on the basis of informed, subjective judgment and relative merit, and not upon the basis of some absolutist doctrine. We recognize the great importance of criminal enforcement of the tax laws, but we are also aware of our civil responsibilities to administer the laws and collect overdue taxes.

These and other changes in our enforcement programs and policies have been evolving over the past 14 months, so it is a bit early yet to expect to see substantial changes in our performance. However, data regarding our operations during the fiscal year completed just last month do reflect some changes for the better. In fiscal year 1974, we were able to examine 16% more returns than we did in fiscal year 1973, with a more than 15% increase in the amount of additional taxes and penalties recommended. These improvements were achieved in spite of the Service's support of the Economic Stabilization and energy enforcement programs throughout

most of fiscal year 1974, and further, in spite of the number of our most experienced audit personnel who were involved in the training of more than 5,400 new revenue agents and tax auditors that we hired during that fiscal year. With the termination of the energy and Stabilization programs, and the deployment of the new hires from last year, we can expect our audit activity to take an even greater surge during the coming year.

As regards our intelligence operations, the overall emphasis of our criminal enforcement activities has been shifted away from special enforcement programs such as Narcotics Traffickers and Strike Forces, and have been aimed more directly toward the taxpaying public in general. This shift in emphasis has enabled us to achieve greater occupational and geographic coverage in our criminal tax sanctions are more equitably applied – reaching the broadest possible spectrum of society within our resource limitations I believe that our revised enforcement philosophy and not only achieves this goal, but more fully meets the intent of Congress in that our resources are being used for the enforcement of tax statutes, rather than as alternative methods for the prosecution of violators of laws normally enforced by other Federal or local agencies.

Lest I give the impression that my concept of redefining tax administration is limited to issues of enforcement, let me assure you that we are extending this doctrine of fairness across the board in all aspects of our IRS operations. A few years ago, for example, most rural taxpayers had to either write a letter or drive to town to get tax information from the IRS. Today, however, with the nationwide installation of the new long distance telephone system, every taxpayer in the country can call an IRS office, toll-free. What's more, we are placing these phone numbers on every notice that we

send to the taxpayer, so that he can call us for clarification of anything that he doesn't understand or that he doesn't agree with. To meet the needs of those whose jobs do not afford them time off during the 8 to 5 work-day, except at the cost of lost salary to themselves, we are experimenting with evening and weekend hours. We are also reexamining our guidelines and those of GSA regarding the location of our IRS offices, so that we can assure that dealing with the Service represents no greater burden on one group of citizens than it does upon another.

In our processing of receipts and returns, where our operations have already made extensive use of modern data processing technology, we are moving ahead with expanded applications of ADP, in many cases, with the aim of enhancing the equity of tax administration. The most ambitious of these undertakings relates to the processing of information documents. The Service receives hundreds of millions of these documents annually, relating to the payment of royalties, professional fees, dividends and interest, as well as to normal salaries. These are not fully checked at this time, but we examine many tapes reporting compensation, and we sample others.

To correct the situation, we are preparing to implement working on a full document matching program, including the potential use of optical scanning, to permit us to review the information documents from all taxpayers, which will then be cross-checked with their tax returns. We estimate that such a cross-referencing will identify substantial amounts of under-reported income which will, of course, be translated into additional tax dollars from those who underpay, and refunds to those who deserve them but do not apply for them, thus making tax administration more equitable.

In another processing improvement, we are working with Treasury and the Federal Reserve to see if we can't speed up the reporting of Federal Tax Deposits to the Service. At present, delays four to six weeks between the payment of tax to a member bank and the receipt of notice of that payment by the IRS result in our generating delinquency notices and otherwise troubling taxpayers who have already fully discharged their payment obligations. Such situations only promote the image of an inefficient tax administration bureaucracy. Also, these delays impair our collection activities; we need early warning when taxes are not paid on time.

Along the same line, we are also working with the Federal Reserve people and with our own revenue processing managers in the development of steps to appreciably accelerate the speed with which our local offices are informed of the FRB's receipt of bad checks for the purchase of FTD's. At present, the lag time between the issuance of such checks and the notification of local IRS offices that such checks have not been honored typically amounts to three months or longer. In cases involving individuai taxpayers, such delays pose only a minimum burden upon the Service's revenue processing mechanism. However, large employers normally pay their withholding taxes to us on a weekly or bi-weekly basis in increments amounting to tens of thousands of dollars.

The present lengthy delays in our receipt of notification that such withholding payments have *not* actually been made means that marginally solvent institutions may amass a very substantial tax liability before the Service becomes aware that the firm may be in financial difficulty. Under such circumstances there is clearly a potential, which is too often realized, for the accrual of a massive liability which adds to the firm's fiscal woes, jeopardizes the employees' rights, places additional claims upon the firm's limited resources,

thereby competing with the institution's other creditors, and curtails the Service's options for collection. Although the Service certainly cannot be held responsible for the circumstances which led, either to the firm's insolvency in the first place, or its incurring an enormous tax liability in the second, we do come in for more than our share of criticism whenever we are forced by such circumstances to take firm action to satisfy the government's just claims.

Of course, the thing that makes such situations doubly frustrating is that, although the delays are not the fault of the IRS, it is the Service which must take the blame for them. As I say, we are working with the Federal Reserve in an attempt to find an acceptable means to short-cut their processing of FTD's and their notification of dishonored checks, and I trust that we will be successful. If we are not, you can expect to hear me saying a lot more about this in the future, because I don't believe that the Service should take a bum rap for a problem that is simply not of its own making nor under its own control.

We are also working in the technical areas to enhance the fairness and openness with which we deal with all taxpayers. For example, I have had a Task Force created to examine the technical skills and knowledges required of our general managers in the field, so that we can assure ourselves that no matter in which district the taxpayer happens to reside, he will be afforded the same technical judgment and have his problems handled in as nearly as possible the same technical environment throughout the country. We can't construe a provision of the Code one way in Maine and an entirely different way in California. We are pursuing the use or advanced ADP technology in this area as well, with a project to put our technical rulings on a computer and have them available, up-to-date and readily retrievable in all districts of the Internal Revenue Service.

Added to all the foregoing, we have renewed our endeavors to simplify IRS forms, instructions, regulations and correspondence. Even prior to my confirmation as Commissioner of Internal Revenue, I became actively involved in this effort, because this was the area which I, as a tax attorney in the private sector like you, had come into the most common contact with the IRS. During FY 1974 Service personnel reviewed more than 1,600 form letters, notices, and stuffers to improve their quality, and to eliminate duplicative or obsolete communications. As a result of this effort, over 500 such items were cancelled outright or consolidated with other forms. Moreover, I have personally worked on the revision of the most frequently issued Audit and Service Center letters.

In response to concerns voiced during the Montoya hearings, the Service initiated a number of new publications and revised many more to explain tax law and tax administration processes to the public in nontechnical language. I believe that the revision of two particular IRS publications merit special mention in this context. Publication Number 556 has been expanded to provide the taxpayer with a clear statement of his rights and privileges as they relate to the IRS Audit process. This includes a straightforward explanation of the taxpayer's appeal rights which, I may add, are also now being referred to in all of our first contact audit letters. Publication Number 586 now sets forth the rights and responsibilities of taxpayers as regards the IRS Collection process.

The principal thrust of both these publications is to provide the average taxpayer with the kind of knowledge and understanding regarding our Audit and Collection processes which you and I and our clients have possessed for years, but which the man on the street has quite often found to

be unnecessarily mysterious. As a further general improvement in these areas, I have had it made a matter of IRS policy for the appropriate, free IRS publications to be referenced in all our pattern letters, tax forms, instructions, and regular correspondence. It just seemed to me that, as long as we had printed up all of this information material, we had an obligation to afford the taxpayers every opportunity to know of their existence and use them.

While these efforts have been aimed at improving tax administration across the board, it should be obvious that the principal beneficiaries of such clarified IRS communications will be the little man; the average taxpayer and the small businessmen who cannot afford high-powered legal or technical advice, and for whom the jargon of the Revenue bureaucracy is practically a foreign language. These efforts at simplification are integral to the redefinition of tax administration, since the degree to which we can sucessfully communicate to each citizen his or her own tax responsibility is yet another measure of the equitability of tax administration.

Although much of the technical sophistication of our publications and forms is required by the complexity of the tax law itself, all taxpayers found a number of improvements in their 1973 income tax packages. The instructions in general for both the Forms 1040 and 1040A were shortened and simplified, and we were able to include in the tax packages a directory of the toll-free IRS taxpayer assistance telephone numbers for the entire United States. Also, in filling out their returns, taxpayers were no longer required to list the recipients of contributions for which they had cancelled checks or receipts, now were they required to list the names and dates for claiming medical payments. We hope to do more with these forms for 1974, as I am currently working on these.

We will continue to do what we can in this respect to ease the burden of tax filing. But, any extensive simplification of tax forms or instructions must really be tied to revisions in the tax law. For example, in the 1972 tax packages, the Presidential Election Campaign Fund check-off was placed on a separate form from the 1040. There was a very low rate of participation in the program, and the separate form and the low participation generated considerable criticism of the IRS.

Now, there are a great number of other simplifications and clarifications to the tax forms and instructions which can be accomplished via the avenue of tax legislation. I am sure that you have been following the progress of the tax legislation presently being considered by the House Ways and Means Committee. I am pleased to say that among the items which have been subject to the Committee's deliberations have been a number of the tax simplification proposals recommended by the Treasury in April of last year, many of which originated within the IRS.

Time limitations prevent me from going into all of the various changes which have tentatively been adopted by the Committee but I would comment that I believe that the simplification of provisions for child care deductions and the extension of simplified tax table computations to cover taxpayers with incomes up to $20,000 both represent moves beneficial to a large number of filers. Although these decisions are only tentative, I have high hopes that the broad support so far evidenced for these and other simplification proposals will eventually carry them into law. Of course, as we are all aware, the 93rd Congress is drawing to a close with elections coming up in November. This may rule out any tax revisions this year. I am hopeful, however, that we can look

to the 94th Congress for some significant simplifying improvements, along with other, more substantive tax reform aimed at curbing questionable tax-shelter practices and various other abuses.

I would like to be able to say that the wide-ranging efforts which I have discussed with you today have done the trick, that the Service now has its feet firmly planted in the proper direction, and that the "Redefinition of Tax Administration" requires but a short passage of time to become a reality. I would like to be able to say this, but it would not be completely true. One thing that I have learned in my relatively short career within the bureaucracy is that change is very difficult to achieve.

Let me hasten to add, before closing, that I do not wish to leave you with the impression that, in purifying the definition of Tax Administration, I am advocating an "isolationist" position for the Internal Revenue Service, or that I am turning a cold shoulder to *all* of the potential changes that the IRS may encounter in the future. On the contrary, there are a number of changes on the horizon that I welcome as real enhancements to sound tax administration in the United States. Three such changes come to mind which I would commend to you today.

The first of these deals with Title II of the Revenue Sharing Act of 1972, which provides for the collection of qualified state and local taxes by the Internal Revenue Service; a concept which has been labeled "piggybacking." Call it what you will, and I think piggybacking is an adequate shorthand for the concept, I believe that this is the way to go in the future. The potential economies-to-scale are patent and substantial. This concept constitutes a rather significant departure from standard practice in the past, and for that

reason it has been a little slow in coming since the passage of the act nearly three years ago; but I can assure you that I am pressing vigorously for the completion of the necessary regulations and guidelines so that individual states who are willing to participate in this program will be able to do so at the earliest possible date.

Another, more recent legislative mandate for the Internal Revenue Service is the Pension Reform Act of 1974, and I want to assure all of you that I wholeheartedly endorse this mandate. The IRS has long been involved with the examination of private pension funds, whose assets today amount to approximately two hundred billion dollars. In the course of our long-standing role vis-a-vis these funds, IRS representatives have witnessed some unsatisfactory practices and the mismanagement which, in some cases, have resulted in the bankruptcy of trusts and the loss of employees' retirement savings, yet it has been difficult for us to act effectively. The new legislation will provide additional sanctions that we need. Of course, Internal Revenue's interest in these matters is a good deal more than simple altruism. We are principally concerned that institutional payments to these funds are ultimately used for the purposes for which these institutions receive tax deductions.

In fact, I think I can say that the new Pension Reform legislation, rather than distorting or inappropriately broadening our tax administration role, represents a happy coincidence of interests, whereby the fair and equitable application of the tax law will serve to benefit both the employees covered by such plans and the taxpaying public as a whole. In addition, the Pension Benefit Guaranty Corporation, which is being created by the new legislation, will provide insurance coverage to the roughly two thirds of the private pension plans which are not presently afforded such protection. Of course, the PBGC will also have a strong interest

in seeing to it that these pensions are soundly administered, and you can bet that our people will be working very closely with theirs in carrying out our respective responsibilities under the new act.

The third positive change which I see on the horizon for the IRS is an innovation of the Service's own making; this is the first overhaul of our automated Master File system since it was initially installed in 1960. This new system will make the fullest possible use of the most up-to-date developments of information technology in speeding our processing, keeping tax accounts correct, reducing our errors and detecting those of taxpayers, improving our assistance to the public and, perhaps most important of all, enhancing our ability to assure the taxpayer's right of privacy. Under the new revenue accounts management system, which is presently being designed, a variety of sophisticated mechanisms and procedures will be employed to protect all information regarding the taxpayer and his dealings with the IRS from unauthorized access and disclosure. These defenses will be even more stringent than those built into our present ADP system.

You know, this privacy issue is looming very large in the public forum, and in the legislatures throughout this country, and I rather imagine it is going to be with us as a topic of heated public debate for some time to come. I would just like to say that I am somewhat concerned that the privacy issue may become distorted by some overzealous defenders of individual liberty. We cannot bury the issue of privacy by passing legislation which would restrict institutions, either private or public, from collecting or keeping *necessary* personal data on individuals or organizations. We are living in an information age. If our institutions are going to meet their responsibilities to the public which they serve, then they are going to need information regarding that public.

If our institutions are going to respond effectively to energy shortages or aberrant economic developments, if we are going to plan for adequate medical and educational facilities, or make determinations regarding optimal capital investments, if we are going to run programs like Medicare and Social Security and if we are going to administer the revenue laws, then we are going to need personal data banks. Therefore, the issue should not be one of whether or not to collect necessary information but rather how to protect that information from disclosure and/or inappropriate use. The Internal Revenue Service, or any other institution, public or private, which collects personal data on individuals stands in a fiduciary relationship to the individual with regard to that data. In view of this, it seems to me that a vital first step is for our legislatures to strengthen and tighten laws making the misappropriation and misuse of personal data as much a criminal act as the misappropriation and misuse of funds held in a fiduciary relationship.

In this respect, the Internal Revenue Service has traditionally been on the right track. As I am sure you are all aware, the Service has long operated under strict antidisclosure provisions built into the Internal Revenue Code. We are not resting on our laurels, however. We have recently completed a thorough review of the antidisclosure provisions as a result of which we have developed proposed revisions to the Code which would reduce the degree of access to tax information that is presently permitted under law and would broaden the application of that law to areas not envisioned during the drafting of the 1954 Code. One aspect of the proposed revisions might place an additional burden upon the Service, since it would require the IRS to provide statistical studies to other Federal agencies, upon their request. But I willingly accept this burden for the Service, in lieu of the alterna-

tive, which would be to provide raw tax data to other Federal agencies for their analytical purposes.

While I'm on the subject of privacy, I would like to devote a moment or two to another, somewhat related topic, and that is secrecy. There are those who seem to confuse the concepts of privacy and secrecy, and somehow try to make secrecy the institutional concommitant of privacy. I do not believe that this is accurate or appropriate, particularly as regards public institutions. It seems to me that the workings of a public institution should be as open as possible to the public which that institution serves. That is, after all, what the Freedom of Information Act is all about. Except where the public knowledge of certain agency policies, practices, and procedures would impair the ability of that agency to accomplish its Congressional mandate of law enforcement, such an agency should have nothing to hide from the citizenry.

It was with this philosophy in mind that I announced, just two weeks ago when I appeared before the Senate Subcommittee on Administrative Practice and Procedure, that I had requested our Technical organization to open up the IRS ruling process.

As with some of the other IRS policies which I have discussed with you this afternoon, the traditional Internal Revenue policy of restricting the publication of tax rulings was based upon sound rationale. These rulings are made on the basis of specific details of individual taxpayer circumstances. The statute and regulations simply do not permit us to disclose this information. Moreover, apart from the specific requirements of the statute, general philosophical questions arise because many of these rulings involve discussions of the taxpayer's private affairs and plans for the future; thus, it could be (and was), reasonably argued that the information contained in these rulings was essentially proprietary, and its

revelation could be inimical to the taxpayer's interest. For a number of years, the foregoing reasoning did indeed seem to represent good and sufficient arguments for not publishing the great majority of our rulings.

When our policy in this area began to be seriously questioned, we found that our position on the general philosophical level, as contrasted with statutory construction, was not entirely satisfactory. Principally, we were troubled by our critics' argument that the contents of the private, or letter rulings might constitute a body of secret tax law, representing official positions on the interpretation of the Internal Revenue Code. The legal research and debate which went into producing these interpretations was paid for by the public, yet they were into producing these interpretations was paid for by the public, yet they were essentially available only to a relatively limited number of tax practitioners.

In addition to the substantive questioning of our basic rationale, these and other critics also raised a fundamental issue of principle regarding the letter ruling process, the issue of Internal Revenue's institutional integrity. Now, from the Service's point of view, this was merely an issue of image rather than of fact. There is no question in my mind as to the integrity of the Service in general or its technical rulings process in particular. However, so long as the bulk of our rulings remained closed to public access, the citizenry would have to take *our* word for our own integrity. Well, if you've read anything about the opinion surveys regarding the public trust of both private and public institutions in the past year or so, you can imagine how effective such a defense of integrity might be.

Public trust is absolutely paramount to maintaining the self-assessed voluntary compliance that makes our system of

tax administration possible. If such confidence is not forthcoming, as a matter of course, then we must gain it; we must demonstrate by our actions and our openness that we are entitled to the public's trust. In view of this, I determined that the tax ruling process should be opened up in the future. Now, we are not rushing into this change blindly; nor are we going to jeopardize the taxpayers' reasonable expectations or privacy in pursuit of our institutional self-interest. Our Technical people and our Chief Counsel's office are working to determine the best manner of achieving a maximum degree of public access.

Obviously, we have not worked out the complete details of this change. For example, we have reservations about the extent to which we should release trade secrets submitted with requests for mandatory rulings, those rulings that the taxpayer is required by law to seek, for example, under Section 367 or to change either the method or period of his accounting. Similarly, we will not publish the two thousand or so Technical Advices which we issue each year, inasmuch as they are involved exclusively with the audit process. However, we believe that we will be able to provide access to all letter rulings; we plan to achieve this access by asking all taxpayers to include a waiver of confidentiality in their request for rulings.

As a footnote to this new policy, I would like to make it clear that this change is prospective and not retroactive; thus, it does not affect our position regarding the Tax Analyst and Advocates suit, presently in the Court of Appeals, which aims to force the Service to open all *past* letter rulings to the public. Such a course of action remains unacceptable to us because of the specific requirements of the Code and Regulations.

The decision to open the tax ruling process will be realized in practice sometime during the Fall of this year. At approximately the same time, or perhaps a little earlier, the Service will take yet another step in the direction of increased openness; this will be the completion of the release to the public access of the bulk of the Internal Revenue Manual. Currently, we are working on the process of dividing that part of our manual that has not already been released, into two portions; one public, and the other "protected." The protected portion of the manual will be restricted to law enforcement activities only; all other aspects of our policies and procedures will be open to the public scrutiny.

In seeking to "redefine tax administration", I am well aware that I may be promoting a losing cause. I say this because I know that my position rests upon principle, and principles and ideals have been losing more and more battles to pragmatism and expediency in recent years. Principles aside, for example, the proposal that the IRS administer an income maintenance program is, after all, not without its pragmatic appeal. As one of my colleagues has observed, we don't even have to change our stationery; we'll still be the IRS – The Income Redistribution Service.

Beyond the concrete proposals now under discussion for broadening the IRS role, I can see reasonable men advancing new ideas; for example, charging the IRS with the responsibility for policing almost all activities – not just tax – of multi-nationals. Moreover, I am not full certain that we are out of the controls business for good. Further, if the 94th Congress does undertake a full-scale revision of the 1954 Code, I would not be surprised to see a whole raft of new provisions aimed at promoting protection and restoration of the environment built into the Revenue provisions. This would thrust our enforcement and rulings processes

squarely within the jurisdiction of the Environmental Protection Act, and put the Service right in the middle of a highly volatile sector of public concern.

In summary, I feel rather certain that the continued integrity of Tax Administration cannot rest with the actions of one Commissioner, or be reasonably assured through a single, short-term re-orientation of the IRS. Rather, it will be, of necessity, an ongoing effort requiring the conscious participation of our political leadership, IRS management, and the tax law profession, of which I am proud to number myself a member.

# # #

APPENDIX F

[Article appearing in Wall Street Journal, Monday, May 19, 1975].

Bureaucratic Tug-of-War

JUSTICE DEPARTMENT AND IRS ESCALATE FIGHT OVER USE OF TAX MEN ON CRIME 'STRIKE FORCE'

By Mitchell C. Lynch
Staff Reporter of The Wall Street Journal

WASHINGTON – In happier days, William Smith found true exitement and intrigue at his job with the Internal Revenue Service.

Mr. Smith (that isn't his real name) was an IRS auditor with a Justice Department "strike force," working full-time with Federal Bureau of Investigation agents and other law enforcers in a battle against organized crime. Armed with a pencil instead of a pistol, Mr. Smith helped send some crooked public officials, racketeers and Mafia men to prison.

But his role in the fight against big-time crime ended abruptly last July when IRS Commissioner Donald Alexander pulled tax men off the 17 strike forces across the country. Mr. Smith, disliking the thought of returning to his relatively mundane job at the tax-collection agency, left the federal government and now has a job with a private concern.

"I was pretty disappointed when I was told I had to leave the strike force," he says.

Justice Agency Angered

While Mr. Smith was disappointed, the Justice Department became downright angry. William Saxbe, who was Attorney

General then, fired off a letter to IRS Commissioner Alexander saying the withdrawal action had "dealt a severe blow to the strike-force effort." And now the new Attorney General Edward H. Levi, is planning to go over Mr. Alexander's head, according to Justice Department sources, and seek a reversal from the IRS chief's boss, Treasury Secretary William Simon.

To the Justice Department, the reason IRS auditors are needed full-time is simple: Organized crime fundamentally deals in the illicit procurement and use of money. "Track down where the money came from and where it goes, and you've got your man," says a top Justice Department official.

But Mr. Alexander sees things differently. The sole function of the IRS, he says, is to gather in all the tax revenue legitimately owed the federal government. The tax agency, Mr. Alexander declares, wasn't set up to be "a generalized tool of law enforcement."

Some others in Washington say that beneath the substance of these arguments is a more basic cause of the dispute: bureaucratic jealousy. "Alexander started it off by making a big fuss over nothing," says a government man familiar with the controversy. "Now Levi's getting drawn into it and he's drawing Simon into it. That's pretty heavy artillery for a pea-shooter incident."

The strike-force concept was developed in the 1960's to coordinate the major law-enforcement agencies against organized crime. Besides the IRS and FBI, the agencies involved include the Secret Service, the Labor and Postal departments, the Treasury's customs and alcohol, tobacco and firearms branches, with help now and then from the Securities and Exchange Commission and state and local police agencies.

The New York strike force even has representatives of the Royal Canadian Mounted Police.

"It's the team approach," says a strikeforce official in Washington. "For the first time, we have a coordinated program against organized crime." The main targets include illegal gambling, loan sharking, narcotics, securities thefts, fencing of stolen goods, prostitution rings and tax evasion.

By statistical measurement, the concept has been strikingly successful. The Justice Department says that in 1961, before the forces were established, federal enforcers were responsible for the indictments of 49 persons for organized-crime offenses. Last year, the total soared to 2,729. "In some cities we've caused a complete disruption of the syndicates," a Justice Department official says.

And IRS auditors did their share, the Justice Department says. A typical example: Labor racketeers offer a company "labor peace," or an assurance against strikes, in exchange for 100,000 shares of the company, thereby infiltrating the concern. An IRS auditor, armed with subpoena powers to examine the company's books, spots the payoff, and the racketeers are nabbed for failing to pay income taxes based on receipt of the shares.

"The auditor can see things that I as a lawyer can't see," says the director of a strike-force unit. "Proving that dirty money is being invested in clean business can be a monumental task."

Capone Case Cited

Critics argue, however, that federal law enforcers use tax evasion as a cop-out when they can't nail mobsters for more serious offenses. (The most famous example is Al Capone, the 1930s Chicago gang leader who was finally imprisoned

for failing to pay taxes on his illicit income – not for the illegal activities themselves.) But a strike-force official replies: "Our main job is to get those guys off the streets, out of operation. Hit them in the pocketbooks, if need be. This isn't fun and games; we're dealing with powerfully dangerous people."

Yes, Mr. Alexander says, but tax laws shouldn't be applied "selectively" to bag mobsters. The strike-force concept "puts the IRS in a position of setting itself as judge between good and bad in our society," he asserts. "Clearly, under such circumstances, the IRS ceases to view all taxpayers as being equal under law."

Would the IRS commissioner resign if overruled by Treasury Secretary Simon? "I don't think so," Mr. Alexander replies, taken aback by the question. After all, he says, the issue involves only 17 of the service's 15,000 auditors, one for each strike-force unit. "That's a small amount," he adds.

Mr. Alexander says his motive is clearcut: He doesn't like losing control over any of his tax men to the Justice Department or to anyone else. He feels even more strongly since the recent disclosure that IRS strike-force agents in Miami hired a woman informant to learn about the sex lives and drinking habits of prominent Floridians, including three federal judges. To the indignant Mr. Alexander, sex and booze have nothing to do with tax-law enforcement.

Just Ask, He Says

Furthermore, the IRS commissioner says anytime the strike forces want to use his auditors in individual cases, all they have to do is ask. But Henry Dogin, the Deputy Attorney General who oversees strike-force operations, claims that not having an auditor around full-time is having a "devastating

effect" in the battle against organized crime. Even he concedes, though, that the full effects won't show up for about three years, the usual time between the beginning of an investigation and its appearance in court.

Meanwhile, the Alexander stance apparently is hurting morale throughout the strike-forces and at the IRS. "If Alexander wins this one, it shows that we aren't held in such high regard," a regional strike-force official says. John J. Olszewski, 50 years old, is "retiring" as head of the IRS Intelligence Division, reportedly in a dispute with Mr. Alexander's contention that the tax agency hasn't any business snooping around for criminal offenses. Mr. Alexander says he expects some disagreement with his policies. "I would be quite surprised if all of us marched in mental lockstep," he remarks.

APPENDIX G

[Letter of John Murphy to Yigal Korren dated February 1, 1974].

JLMmfk
95-100-662

Yigal Korren, Consul
Embassy of Israel
1621 22nd Street, N.W.
Washington, D.C.

Re: Samuel Shapiro

Dear Mr. Korren:

This is in confirmation of the communication to you by telephone today informing you of the proposals made by the attorney for Samuel Shapiro upon the basis of which his client would surrender to your agent for extradition to Israel. Mr. Nathan Lewin presented the following alternative proposals:

Proposal No. 1

If Mr. Shapiro is given assurance by the Government of Israel that the prosecutor will recommend to the court in Israel that bond for his release during the pendency of the criminal proceedings there be set at no more than 100,000 Israeli pounds, Mr. Shapiro would surrender within two or three days after receiving such assurance, for transportation to Israel. A further condition of this proposal is that all conditions to which the Government of Israel had previously agreed relating to the manner in which Mr. Shapiro should be taken into custody and the manner in which he would be kept under control and supervision during the trip to Israel would

apply to his surrender pursuant to this proposal. Mr. Lewin explained that Mr. Shapiro has access to assets in Israel, such as real property owned by his relatives, which could be used by him to put up bond not in excess of 100,000 pounds.

Proposal No. 2

If the Government of Israel should consider bail in the amount of 100,000 pounds as inadequate and require bail in the amount of 250,000 pounds, Mr. Lewin proposes that the extradition of Mr. Shapiro be deferred by voluntary agreement of the Government of Israel to await the outcome of the tax proceeding now pending before the Tax Court of the United States, including any appeals to higher courts. Mr. Lewin indicated that he recognized that said tax proceeding could probably not be resolved without extended proceedings including a trial on the merits; however, he indicated his willingness to do whatever is within his power to expedite those proceedings before the tax court. Mr. Lewin's own estimate of the time which would be required to conclude the tax proceedings was indicated to be not more than six months if it is possible to expedite them.

Proposal No. 3

This proposal assumes that the Government of Israel would not be agreeable to Proposal No. 1 under which bail would be recommended in the amount of 100,000 pounds. Mr. Lewin suggested that security to the Government of Israel for the difference between the 100,000 pounds which would be tendered from sources available to Mr. Shapiro in Israel and the 250,000 pounds or such other amount as the court would set as an appropriate bond for his release would be provided by Mr. Shapiro and his wife executing appropriate instruments in favor of the Government of Israel assigning their interests in their accounts and properties owned solely

by Mr. Shapiro or jointly or by tenants by the entirety as husband and wife. The single property jointly held referred to in the discussion pertained to the home in Munsey, New York, title to which we were informed is in the names of Mr. and Mrs. Shapiro as tenants by the entirety. Under this proposal, the Government of Israel would be offered a lien on the Shapiro bank accounts and real property in the United States which have been either levied upon under the jeopardy assessment made by the Internal Revenue Service of the United States Government or against which a lien for unpaid taxes has been filed in the county in which the real property is located, such lien in favor of the Government of Israel to be subordinated to and contingent upon the lien of the United States and subordinate also to the payment of all expenses relating to the tax proceeding in the United States including attorneys fees. Mr. Lewin acknowledged that, viewed superficially, there appears to be no reason why proposal No. 1 above would be more advantageous to the Government of Israel than proposal No. 3 since under the third proposal Israel would receive as bond the 100,000 pounds specified under No. 1 and an additional source of security derived from the subordinate lien on Mr. Shapiro's assets in the United States; he points out in support of the tender of proposal No. 1 that it avoids any involvement by the Government of Israel in or contingency related to the tax proceedings pending in the United States.

The foregoing proposals were received from Mr. Lewin in our capacity as your attorneys and representatives in the extradition proceeding and pursuant to the suggestion of the Court of Appeals of the District of Columbia that Mr. Shapiro be given a further opportunity to negotiate with your Government in relation to his extradition. I am transmitting these proposals to you on behalf of Mr. Shapiro and his attorney

with the observation that the Department of Justice recommends neither their acceptance or rejection. Your Government is also assured that, should it find all of the proposals made today by Mr. Shapiro's attorney to be unacceptable, the United States Department of Justice stands ready to further represent your Government in any litigation relating to or affecting the extradition proceeding in order to bring those proceedings to an orderly and successful conclusion.

I would deeply appreciate your Government's consideration of Mr. Lewin's proposals at the earliest possible date and its early advice to this Department of its wishes in the matter.

Sincerely,

JOHN L. MURPHY, Chief
Government Regulations Section
Criminal Division